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Sovereignty of the Arctic Islands in International Law

by

Thomas Andrew Persoon ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Arts.

Department of Political Science

Edmonton, Alberta

Fall 1995

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled Sovereignty of the Arctic Islands in International Law submitted by Thomas Andrew Persoon in partial fulfillment of the requirements for the degree of Master of Arts.

Fred Judson

Professor Fred Judson

Professor Ian MacLaren

Professor Roderick MacLeod

15 May 1995

This thesis is dedicated to the exceptional teachers who have helped to shape my life, most notably my mom and dad.

Abstract

This thesis examines the validity of Canada's claim of sovereignty to the Arctic archipelago. It follows an historical-legal framework that begins with Britain's offer to transfer jurisdictional authority to Canada in 1874, and examines Canada's efforts to effectively occupy the region to 1930. A number of primary sources such as the Colonial Office Papers are examined to determine the reasons for the transfer of jurisdiction and the means by which the transfer was brought to fruition. Furthermore, Canada's efforts to secure a claim of sovereignty to the Arctic islands is examined in the light of the dictates of international law regarding the acquisition of title to land. Effective occupation, the doctrine of contiguity and the sector theory are analysed to assess their legal bearing on the question at hand.

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Introduction

In June 1985, the American Coast Guard icebreaker *Polar Sea*, en route from Thule, Greenland to the Chukchi Sea, sailed through the Northwest Passage. The voyage took place without Canada's authorization. Despite Canada's efforts to cooperate with the U.S., the American government refused to request permission for the vessel to pass through the waters of the Arctic archipelago, a region claimed by Canada as part of its sovereign jurisdiction.

After the initial outrage, Canadians were confounded by the actions of the Americans. Canadians had long thought that the Arctic archipelago belonged to Canada. The incident, however, challenged this assumption and led to the realization that the United States, at least, if not other states, may not share Canada's perspective, and may not respect Canada's intentions.

While Canada's national pride may have been bruised by the alleged jurisdictional violation undertaken by the United States, there is more at stake in deciding the question of sovereignty of the Arctic archipelago than determining who can or who cannot enter the region. Of far greater importance is the question *how* the region is to be managed or governed. How will the territory and its inhabitants be treated and protected?

Since the late 1940s, the Arctic archipelago has been increasingly recognized as a region of environmental, economic and strategic significance. Scientific study has discovered that the region is of global importance. It is known to be the nesting ground of a multitude of bird species, and the birthing ground of many varieties of whales and other marine mammals. Despite the region's frigid and often hostile nature in which only the hardy survive, it is also an extremely sensitive environment that does not possess the recuperative powers of more temperate locales. Within the scientific realm, whoever is actually sovereign over the Arctic archipelago will determine what sort of future scientific enquiry will be encouraged and permitted, and how such study will be conducted and regulated.

Although science has discovered an abundance of wealth in the Arctic archipelago, so too has business. It is well known that the region is rich in hydrocarbons, especially in the Beaufort Sea area.The area is said to possess, in addition to oil, considerable reserves of ores, minerals and perhaps even precious gems.

Although the extraction and transportation of such commodities holds tremendous potential, they also pose considerable risks. Industry, especially the mining sector, has sometimes shown little concern for the environment in the extraction of natural resources, and often has also shown little regard for environmental awareness in the handling of waste. With regard to the transportation of such resources, the *Exxon Valdez* disaster indicates the ominous future that may await the Arctic archipelago if the development of the region's resources is not handled responsibly. It is possible that the determination of sovereignty over the Arctic archipelago has tremendous bearing on the economic development of the region. If Canada does possess sovereign control of the territory, Ottawa can regulate the means and methods of resource extraction, and the disposal of waste. Furthermore, it may administer the manner in which these resources will be transported, and specify the routes and safety procedures that are to be observed. Moreover, in the case of an accident, Ottawa would control the manner and thoroughness of a clean up, and would be responsible for holding those at fault accountable for the accident and the resulting damage.

Despite the inestimable worth of the Arctic archipelago in scientific and economic terms, the region has also been recognized as strategically important. The shortest flight trajectory for Russian and American Intercontinental Ballistic Missiles lies over the archipelago. The region also holds tremendous potential as a launching platform for Russian and American submarines equipped with atomic weaponry.

Although the Cold War rivalry between the superpowers appears to have subsided with the collapse of Communism in Russia and Eastern Europe, it has been argued that the issue of global security is now more volatile than during the Cold War. Nuclear weaponry continues to exist, but it may now come into the hands of less responsible regimes. Furthermore, much of the Russian sea-going arsenal now sits in the Arctic port of Murmansk, having lost the southern ports of the Ukraine. Thus, with regard to the question of sovereignty over the Arctic archipelago, the use of the region in future war may be influenced by Canada if it, indeed, holds sovereign authority over the territory.

Although this examination of issues facing the Arctic archipelago is by no means exhaustive, it indicates the importance of the question of sovereign control of the Arctic archipelago. This thesis, therefore, intends to examine the legal status of Canada's claim to the region in question. Even though it is the jurisdiction of Arctic waters that appears to be the center of present dispute, the central focus of this thesis concerns Canada's sovereignty claims to the Arctic islands. Claiming sovereignty appears logical since the jurisdiction of water is primarily determined by the sovereign control of adjacent lands. A state comes to exercise jurisdiction over its surrounding waters only after taking sovereign control of the land territory. Thus, it is to be determined whether Canada has, in fact, established itself as the sovereign of the Arctic's islands.

The intention of this thesis is to examine the question of sovereign control of the Arctic archipelago according to a historical-legal framework. This method has been chosen since most of the contemporary literature on the subject is concerned with either the historical or legal perspective, but rarely both in any comprehensive form. The question of ownership or sovereignty is a legal question, but it requires an historical account to put the matter in proper perspective. Thus, the following examination will attempt to provide an historical and political examination of Canada's involvement with the Arctic archipelago until 1930, the date by which time control of the Arctic islands appears to have been largely settled. This will accompany the legal analysis of Canada's actions to determine whether Canada fulfilled the requirements set by international law--the legal order of the community of nations--for the acquisition of sovereign title to the Arctic archipelago.

1. Canada and the Arctic Archipelago in Historical Perspective, 1874-1880.

In the six years following Confederation, Canada had little interest in the Arctic archipelago, the islands lying to the north of its mainland. The newly formed Dominion had other matters to contend with, including the transfer of three British territories on the North American continent to its jurisdiction.[1] In the Spring of 1874, however, the possibility of also assuming jurisdictional responsibility for Britain's Arctic territories[2] was put before Governor General Lord Dufferin and the Government of Canada by British Secretary of State for the Colonies Lord Carnarvon.

The proposed transfer resulted from two requests for land concessions in the Arctic. In January 1874, Englishman A. W. Harvey sought permission to erect a temporary fishing post in the Cumberland Sound region of Baffin Island.[3] Shortly thereafter, Lt. William A. Mintzer of the U. S. Navy Corps of Engineers applied for a tract of land in Cumberland Gulf to conduct a mining operation of graphite and mica.[4] Both applications proved troublesome as they brought to attention the question of sovereignty in the

---

[1] In 1870, Britain transferred to Canadian jurisdiction Rupert's Land and the Northwestern Territory, both of which were formerly under the authority of the Hudson's Bay Company. The next year, British Columbia, and in 1872, Prince Edward Island were similarly transferred.

[2] British territorial claims in the Arctic archipelago stem from three centuries of exploration. In search of the fabled North West Passage, British explorers, beginning with Martin Frobisher in 1576, were responsible for the discovery and the appropriation of the majority of the archipelago's islands. It is only in the far north, with Grinnell Land on central Ellesmere Island, Axel Heiburg Island and the three Ringnes islands, that foreign claims were superior to those of the British. V. Kenneth Johnston, "Canada's Title To The Arctic Islands." *Canadian Historical Review* (1933), pp. .25-26; W.F. King, *Report Upon the Title to Canada to the Islands North of the Mainland of Canada.* (Ottawa: Government Printing Bureau, 1905), pp. 23, 26-34; Alan Cooke and Clive Holland, *The Exploration of Northern Canada: 500-1920.* (Toronto: The Arctic History Press, 1978), pp. 13-243.

[3] Colonial Office Papers, Series No. 42 (henceforth cited as C.O. 42), Vol. 734, p. 419. Harvey to Colonial Office (January 3, 1874). National Archives of Canada. Compilation of official correspondence between Britain and Canada regarding the transfer of jurisdiction of the Arctic archipelago.

[4] Ibid., Vol. 732, pp. 178-179. Mintzer to Crump, Acting British Consul, Philadelphia, (February 10, 1874).

Cumberland region. However, it was the request of the American, Lt. Mintzer, that more concerned the British.

London, upon investigation, found that British title to the region was not certain. The report of the Hydrographer of the Admiralty,[5] making reference to the British expeditions of Frobisher, Davis and Ross, concluded that three territorial claims based on acts of discovery and symbolic appropriation[6] were made in the region on behalf of the Crown between 1577 and 1818.[7] Regarding the territory of interest to Lt. Mintzer, however, the report acknowledged that,

> Our knowledge of the geography and resources of this region is very imperfect: according to Admiralty Charts much of the area above applied for is on the sea, although it is to be presumed from the precision with which the applicant marks his requirements that he must have certain local knowledge.[8]

Although the report does not mention any previous foreign acts of discovery and appropriation that may have been superior to those of the British,[9] nor is any such notion inferred, the nature of the British claims were such as to cause British officials to question their reliability. Typical of exploratory activity of all nations from the sixteenth to the eighteenth century, the three British territorial claims were appropriated with ceremonies that included the raising of the British flag and the planting of acquisitional declarations in rock cairns.[10] The appropriations were not accompanied with maps or descriptions of any detail; hence, the extent of the Cumberland territory under British title remained uncertain.[11]

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[5] Ibid., Vol. 731, pp. 55-57. (April 20, 1874).

[6] It is generally contended that the establishment of sovereignty over territory previously undiscovered or unclaimed by means of the doctrines of "discovery" and "symbolic appropriation" was predominant from the 16th to the 18th century. The difficulty with this method was that states often made claims greater than could be justified. Hence, the later demand for "effective possession" was in response to this common abuse, but it was slow to be adopted by the practice of States. Gustav Smedal, *Acquisition of Sovereignty Over Polar Areas.* Trans. Chr. Meyer. (Oslo: I Kommisjon Hos Jacob Dybwad, 1931), pp. 14-16. See also: L. C. Green and Olive P. Dickason, *The Law of Nations and the New World.* (Edmonton: The University of Alberta Press, 1989), pp. 7-17. A more thorough examination of acts of discovery and appropriation occurs in Chapter 2, below.

[7] Two of the British claims were made by Martin Frobisher: i) at Hall Island, 63° N. + 64° 50' W., in 1577; ii) at "Meta Incognita," 62° 30' N. + 66° 40' W., in 1578. The remaining claim was made by Capt. Ross at Agnes Monument, 70° 30' N. + 68° W., in 1818. The Mintzer application requested a tract of land twenty miles square, centered at 64° 56' N. + 66° 21' W. C.O. 42, Vol. 731, pp. 55-57.

[8] Ibid., pp. 56-57.

[9] The only foreign claim in the Cumberland region was made by an American at the head of Frobisher Bay in 1861. Johnston, op. cit., p. 26.

The possible implications of informing Lt. Mintzer of this uncertainty concerned the British. Even though the request for land concessions was an isolated incident, the growing American activity in the Arctic[12] caused officials in London to question American intentions.[13] It was presumed that the renunciation of title to the Cumberland region would likely result in the Americans settling themselves on the territory. In a departmental memorandum, an official advised,

> It would be desirable to ascertain the views of the Dominion Govt I think before the FO give any answer. We must remember that if the Yankee adventurer is informed by the British FO that the place indicated is not a portion of H.M.

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[10] C.O. 42, Vol. 731, pp. 55-57. (April 20, 1874). The declarations were records of the appropriation of the respective territories on behalf of the British Crown.

[11] Nothing was discovered to suggest that Britain's title claims in the Arctic archipelago were promulgated by means other than the raising of the Union Jack and the depositing of proclamations of appropriation in rock cairns. In light of the concern for the reliability of British claims in the Cumberland region, it appears reasonable to suggest that British officials may have come to question the reliability of Britain's Arctic claims in general. This would account for the rather ominous warning by a British official that the renunciation of title to the Cumberland region "...might produce *no end of complications...*" C.O. 42, Vol. 731, p. 52. (April 25, 1874). As reprinted in Gordon W. Smith, "The Transfer of Arctic Territories from Great Britain to Canada in 1880, and some Related Matters, as seen in Official Correspondence." (henceforth cited as "Official Correspondence."), *Arctic*, Vol. 14, No. 1 (March, 1961), p. 54. The British may have been concerned that the renunciation of their Cumberland titles, thought to be under British sovereignty by Lt. Mintzer, would likely result in future challenges to other territories supposed to be of British title.

[12] By the mid nineteenth century, British activity in the Arctic was decreasing while that of the Americans was increasing dramatically. With heightened American whaling activity and a number of highly publicized Arctic Polar expeditions, the Americans appeared to be threatening British hegemony in the Arctic. See Cooke and Holland, op. cit. pp. 218-249; Morris Zaslow, *The Opening of the Canadian North 1870-1914*. (Toronto: McClelland and Stewart Limited, 1971), pp. 249-251; Yolanda Dorion-Robitaille, *Captain J.E. Bernier's Contributions to Canadian Sovereignty in the Arctic*. (Ottawa: Indian and Northern Affairs, 1978), pp. 10-11.

[13] There remains some question whether the British erred in their perception of the American threat. It has been contended that American activity in the Arctic was generally of a non-political nature. Gordon W. Smith, *Territorial Sovereignty in the Canadian North: A Historical Outline of the Problem*. (henceforth cited as "Historical Outline"), (Ottawa: Northern Co-ordination and Research Center, Department of Northern Affairs and National Resources, 1963), p. 4.

> dominions he would no doubt think himself entitled to hoist the "Stars and Stripes" which might produce no end of complications.[14]

That the British perceived the threat posed by the United States as serious, and that this threat was responsible for Britain's offer to transfer jurisdictional responsibility for its Arctic possessions to Canada is dramatically illustrated in the note of a British official. "The object in annexing these unexplored territories to Canada is, I apprehend, to prevent the United States from claiming them, not from their likelihood of proving of any value to Canada."[15] Although the citation may exemplify the attitude of British authorities, it is nonetheless misleading and misrepresents the intentions of the transfer.

Despite the shortcomings of Britain's territorial claims on the Cumberland Peninsula, these titles remained undisputed. It is reasonable to assume that since Lt. Mintzer applied to London for land concessions, he, at least, if not the United States, believed the region to be under British sovereignty. The British were in a position to accept or reject the request, but this would ultimately call for the effective occupation[16] of the territory.[17]

London, however, was evidently unwilling to take on the responsibility of effectively exercising jurisdiction in the Cumberland region, or over any of its Arctic possessions for that matter. Ten days after the Hydrographer's report was issued, Lord Carnarvon, in a secret dispatch to Lord Dufferin, inquired,

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[14] C.O. 42, Vol. 731, p. 52. (April 25, 1874). As reprinted in Smith, "Official Correspondence," op. cit., p.54.

[15] C.O. 42, Vol. 759, p. 19. (January 29, 1879). As taken from Smith, "Historical Outline," op. cit., p. 5.

[16] "Effective occupation," in its basic form, is the demand in international law that a state must bring a territory under its control if it is to secure title to the territory. E. De Vattel, *The Law of Nations or the Principles of Natural Law*, 1758. Reprinted in *The Classics of International Law*. Ed. James Brown Scott. (New York: Oceana Publications, 1964), p. 85; *Island of Palmas Case* (1928); 2 United Nations, Reports of International Arbitral Awards, 831, at 845-846.

[17] The requirements for effective occupation are not the same for all territories, but differ according the circumstance of a particular situation. See for instance: *Palmas Case* , op. cit., p. 855. This issue is examined in Chapters 2 and 4, below.

> ...whether your Govt would desire that the territories adjacent to those of the Dominions on the N. American Continent, which have been taken possession of in the name of this Country but not hitherto annexed to any Colony or any of them should now be formally annexed to the Dominion of Canada.[18]

The Colonial Minister continued,

> Her Majesty's Government of course reserve for future consideration the course that should be taken in any such case, but they are disposed to think that it would not be desirable for them to authorise settlement in any unoccupied British Territory near Canada unless the Dominion Government and Legislature are prepared to assume the responsibility of exercising such surveillance over it as may be necessary to prevent the occurrence of lawless acts or other abuses incidental to such a condition of things.[19]

The British did not want the costly commitment of assuming effective control of the distant and difficult Arctic. Thus, rather than settle the matter of the Cumberland territory, Carnarvon sought to preempt all questions of sovereign control of Britain's Arctic possessions by passing responsibility for the territory's administration to Canada.

In light of Britain's reluctance to further its involvement in the Arctic, and given its offer to transfer to Canada jurisdictional responsibility for its Arctic territories, the threat posed by the United States appears to have been rooted in a concern for Canada and its interests. Paternalistic England seems to have recognized the potential value of the Arctic for Canada, and proposed that the Dominion assume responsibility for the administration of these territories for its own protection.[20] Thus, the intention of the transfer of jurisdiction was to assure Canada future access to the North and its resources rather than simply to prevent the Arctic from falling to the Americans.

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[18] C.O. 42, Vol. 731, pp. 58-60. Carnarvon to Dufferin (April 30, 1874). Draft copy.

[19] Ibid.

[20] H. R. Holmden, "Memo. re. The Arctic Islands," (1921), pp. 12-13. National Archives of Canada. (Contained in the Arctic Islands Documents).

Even though Rupert's Land and the Northwestern Territory had been transferred to Canadian jurisdiction in 1870, British officials questioned whether Canada's jurisdiction had already been extended sufficiently far north to include the Cumberland territory.[21] In any event, British officials were not certain. Since the boundaries of Rupert's Land and the Northwestern Territory had never been precisely defined, W.F. King, Chief Astronomer of Canada, concluded that "[i]t is uncertain whether these include the islands to the north, or all the mainland itself."[22] Thus, Britain proposed to extend Canada's jurisdiction to all its remaining possessions in North America, whatever they might be.

Britain's motives for the transfer are therefore clear. The transfer would place Britain's Arctic possessions under Canada's jurisdiction, forestalling Americans from laying claims of their own. Although the territory would come under Canada's control, the Dominion assuming the cost and responsibility of administration, British sovereignty would nonetheless be retained. Since the Dominion of Canada was a product of the British Parliament and had yet to achieve independence from England, the transfer would simply constitute a change in the exercise of administrative control. Her Majesty's Government in London would transfer responsibility for the exercise of jurisdiction of the Arctic territories to Her Majesty's Government in Ottawa. As for Canada, the annexation constituted a free gift, and provided for future expansion northward.

On November 4, 1874 Dufferin responded to the Colonial Minister's inquiry. Carnarvon was informed that the British offer was favourably received by Canadian authorities[23] and formally recognized by an Order in Council by the Government of

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[21] C.O. 42, Vol. 731, p.51. W.D. (?) to Sir H. T. Holland (April 22 ,1874). As reprinted in Smith, "Official Correspondence," op. cit., p. 54.

[22] King, op. cit., p. 7.

[23] C.O. 42, Vol. 730, pp. 5-6. Dufferin to Carnarvon (November 4, 1874).

Canada dated the 10th of October 1874.[24] The tangled succession of developments to transfer jurisdictional responsibility to Canada for Britain's Arctic possessions had begun.

The Negotiations to Transfer Jurisdiction of the Arctic Territories.

The ensuing negotiations began with Carnarvon's request that Canadian authorities make recommendations respecting the form of the proposed transfer, and specify the territorial limits of the land to be included within Canada's jurisdiction.[25] In his dispatch the Colonial Minister suggested that the transfer be approved by an Act of the British Parliament. Carnarvon also informed Canadian authorities, based on reports from the Hydrographer of the Admiralty[26] and from his own department,[27] that the boundaries of Britain's Arctic territory remained undefined and that it was impossible to determine which territories had already been transferred to Canada's jurisdiction. The report of the Colonial Office suggested that the prospective boundaries to the Arctic be set along the 141st meridian in the west and

> [t]o the East the British Territories might perhaps be defined to be bounded by the Atlantic Ocean, Davis Straits, Baffin Bay, Smith Sound and Kennedy Channel. But even this definition w'ld exclude the extreme North West of Greenland....To the North, to use the words of the Hudson's Bay Co. in 1750, the boundaries might perhaps be, "the utmost limits of the lands towards the North Pole."[28]

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[24] Dominion Order in Council, P.C. No. 1248 (October 10, 1874.)

[25] C.O. 42, Vol. 731, pp. 196-199. Carnarvon to Dufferin (January 6, 1875). Draft copy.

[26] Ibid., Vol. 731, pp. 189-195. (December 2, 1874).

[27] Ibid., Vol. 731, pp. 179-185. (December 19, 1874).

[28] Ibid., pp. 184-185.

After some delay, Lord Dufferin responded to the correspondence of Lord Carnarvon.[29] Enclosed in the dispatch was an Order in Council[30] acknowledging both the undefined character of the Arctic territory and the uncertainty as to what territory had already been transferred to Canada's jurisdiction. Regarding the form the transfer should take, Canadian authorities strongly recommended that an Act of the British Parliament approve the deal, so that all doubt might be removed. The recommendations respecting the delimitation of the Arctic were similar to the suggestions of the Colonial Office, but Canada sought to include those areas of North West Greenland that might belong to Britain. No mention was made of the 141st meridian constituting the western territorial limit. In addition, the Order requested that no further action be taken until the end of the next session of the Parliament of Canada. Since the assumption of jurisdictional responsibility for Britain's Arctic claims would tax the revenues of the nation, the approval of Parliament was necessary.

Following Dufferin's response of May 1, 1875, almost three years elapsed during which time Canada did nothing to expedite the matter. In London in August 1876, Canada's Justice Minister, Edward Blake, contacted Lord Carnarvon.[31] Enclosed in the note was an extract from the *New York Times* that announced the organization of an expedition under Lt. Mintzer, under the auspices of the American government, to mine graphite and mica in Cumberland Gulf. Blake drew attention to the original application by Mintzer.

In answer to Carnarvon's inquiry into Canada's response to its April 30, 1875 Order in Council,[32] Blake observed: "I am not aware that anything has been done...and I am not able to speak authoritatively as to the intentions of the Government of Canada on the subject."[33] Blake promised to submit the matter for discussion on his return home.

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[29] Ibid., Vol. 736, p. 393. Dufferin to Carnarvon (May 1, 1875).

[30] Dominion Order in Council, P.C. No. 46D (April 30, 1875).

[31] C.O. 42, Vol. 747, pp. 476-477. Blake to Carnarvon (August 15, 1876).

[32] Ibid., pp. 479-480. Colonial Office to Blake (August 22, 1876).

Three weeks later, in a dispatch to Dufferin, Carnarvon explained that in light of the impending transfer of Britain's Arctic possessions to Canadian jurisdiction, Britain would take no action in reference to the Mintzer expedition unless expressly asked to do so by the Dominion government.[34]

Lord Carnarvon's next dispatch to Canada, on November 1, 1876, was a short note, including the *New York Times* extract of the 27th of October 1876, drawing attention to the successful completion of the Mintzer expedition.[35] Obviously, the Colonial Minister was subtly suggesting that action be taken by Canada, but Carnarvon's prodding failed to elicit a response from Ottawa.

Almost one year later, Carnarvon, alarmed by American activities in the Arctic, notably the successful completion of the Mintzer Expedition, and frustrated at the lack of progress in bringing the transfer of jurisdiction to conclusion, urged that action be taken by Canada. In a dispatch to Lord Dufferin the Colonial Minister wrote,

> From reports that have appeared in the Newspapers I have observed that the attention of the citizens of the United States has from time to time been drawn to these territories and that private expeditions have been sent out to explore certain portions of them, and I need hardly point out to you that should it be the wish of the Canadian people that they should be included in the Dominion great difficulty in effecting this may easily arise unless steps are speedily taken to place the title of Canada to these territories upon a clear and unmistakeable footing.
>
> I have therefore to request that you will move your Ministers to again take into their consideration the question of the inclusion of these territories within the boundaries of

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[33] Ibid., p. 369. Blake to Colonial Office (August 23, 1876).

[34] Ibid., p. 371. Carnarvon to O.A.G. (September 13, 1876).

[35] Ibid., p. 373. Carnarvon to Dufferin (November 1, 1876).

> the Dominion, and that you will state to them that I shall be glad to be informed, with as little further delay as may be possible, of the steps which they propose to take in the matter.[36]

Canadian authorities responded without delay. Included with Lord Dufferin's dispatch[37] to the Colonial Minister was an approved Order in Council[38] which explained that "[t]he subject was...allowed to remain in abeyance as there did not seem, at that time any pressing necessity for taking action...." Carnarvon was further informed that the subject would be brought before the next sitting of Parliament, and that resolutions would be submitted authorizing the acceptance of the transfer of jurisdiction by Canada.

In the Spring session of 1878, seven resolutions concerning the transfer were placed before the Canadian Parliament. Debate centered around the criticisms of Mr. Mitchell, the sole opponent of the transfer, who contended that the territory to be administered by Canada was of little value, and that its administration would place unnecessary stress on the finances of the nation.[39] John A. Macdonald, however, cautioned that American claims in the Arctic would surely result if Britain's offer were not accepted, and, speaking with regard to bilateral fishing arrangements, the Prime Minister suggested that title to the Arctic territory would provide Canada with "...a great lever with respect to any future arrangement with the United States...."[40] The joint address to the Queen by Canada's Senate and House of Commons of May 3, 1878,[41] approved the resolutions to proceed with the transfer of Britain's Arctic claims to Canada's jurisdiction.

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[36] Ibid. Carnarvon to Dufferin (October 23, 1877). No page number accompanies the draft copy contained in the Arctic Islands Documents.

[37] Ibid., Vol. 749, pp. 788-789. Dufferin to Carnarvon (December 1, 1877).

[38] Dominion Order in Council, P.C. No. 922D (November 29, 1877).

[39] Canada, House of Commons, Debates (May 3, 1878), pp. 2386-2394.

[40] Ibid., p. 2390.

[41] King, op. cit., pp. 9-10.

Essentially, the address reiterated Canada's original position enunciated in the April 30, 1875 Order in Council. Canadian officials recommended that Britain's offer be accepted, and requested that, in order to avoid all doubt, an Act of the Imperial Parliament define Canada's north-easterly, northerly, and north-westerly boundaries, with reference to the following schedule:

> On the east by the Atlantic ocean, which boundary shall extend towards the north by Davis strait, Baffin bay, Smith strait and Kennedy channel, including all the islands in and adjacent thereto, which belong to Great Britain by right of discovery or otherwise; on the north the boundary shall be so extended as to include the entire continent to the Arctic ocean, and all the islands in the same westward to the 141st meridian west of Greenwich; and on the northwest by the United States Territory of Alaska.[42]

Further, the Order in Council requested that the transfer endow Canada with full executive and legislative authority over the territory, with the assurance that the Parliament of Canada was willing to assume the duties and obligations arising from the transfer.[43]

Prior to the debate in Ottawa, W. R. Malcolm, an official with the Colonial Office, questioned the advisability of giving effect to the transfer by an Act of the British Parliament when less troublesome means might exist. Reference was made to the Law Officers of the Crown requesting an opinion on the possibility of exacting the transfer merely by means of an Order in Council.[44]

On the advice obtained from the Crown's legal department,[45] Sir Michael Hicks-Beach, Lord Carnarvon's replacement as Colonial Minister, referred the matter of the method of transfer to Lord Dufferin. Hicks-Beach contended that an Order in Council would be sufficient to transfer jurisdictional authority for the Arctic territories to Canada. However, the Colonial Minister cautioned that if the Arctic territories were to be erected into provinces, and were to be represented in Parliament, recourse might have to be made to Imperial Legislation since Canada would not be competent to change the legislative scheme established by the British North America Act 1867.[46] Hicks-Beach informed Dufferin that no action would be taken until the Canadian government gave its approval.

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[42] Ibid., p. 10.

[43] Ibid., p. 10.

[44] C.O. 42, Vol. 749, pp. 793-795. Malcolm to Attorney General and Solicitor General (Feb. 22, 1878). Draft copy.

[45] Ibid., Vol. 754, pp. 531-533. Law Officers to Hicks-Beach (May 28, 1878).

Dufferin's reply of October 8, 1878,[47] included an Order in Council[48] and a memorandum[49] by Minister of Justice Laflamme. In response to the British legal opinion, Laflamme cautioned that the powers of Section 146 of the British North America Act of 1867, allowing admission into the Union of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and the Northwestern Territory, may have been exhausted. In order for Canada's territorial limits to be extended so as to allow the Government and Parliament of Canada to exercise executive and legislative authority under the British North America Act of 1867, further Imperial legislation would be necessary. Thus, Canadian authorities questioned the validity of an Order in Council and continued to advocate that the transfer be effected by an Act of Parliament.

Regarding the matter of erecting the territories into provinces and providing for their representation in Parliament, Laflamme directed the attention of the Colonial Minister to the amendments of 1871 to the British North America Act which provided Canada with such authority.

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[46] Ibid., Vol. 753, pp. 395-397. Hicks-Beach to Dufferin (July 17, 1878). Draft copy.

[47] Ibid., Vol. 754, p. 142. Dufferin to Hicks-Beach (October 8, 1878).

[48] Dominion Order in Council, P.C. No. 1162D (October 2, 1878).

[49] C.O. 42, Vol. 754, pp. 145-151. (August 30, 1878).

Reluctantly, Hicks-Beach proceeded with an Act of Parliament and referred the draft bill to the Admiralty for observations and suggestions.[50] With the response of the Admiralty[51] came the report of Frederick Evans,[52] Hydrographer of the Admiralty. Evans was critical of the legislation for its presumptiveness to claim all territory up to the Pole as British. Reference was made to American penetration of the archipelago to 82° north latitude by 1873. The British did not go further than 78° 30' north latitude until the Arctic Expedition of 1875-76. Hence, Evans' suggested amendment to the boundary description made no mention of territory beyond 78° 30' north latitude.

> [O]n the East the Atlantic Ocean, which boundary shall extend towards the North by Davis Straits, Baffin's Bay and Smith's Sound as far as the parallel of 78°-30' of North Latitude, including all the islands in and adjacent thereto which belong to her Majesty by right of discovery or otherwise. Thence on the North the boundary shall be the parallel of 78°-30' North Latitude, to include the entire continent to the Arctic Ocean, and also the islands in the same Westward to the one hundred and forty first Meridian West of Greenwich; and thence on that Meridian Southerly till it meets on the N.N.W. part of the Continent of America the United States territory of Alaska.[53]

To this the Board of Admiralty agreed.

Evans' suggestions were short lived. Doubts surfaced among government officials about the wisdom of attempting a precise delimitation of the Arctic territory while the very right of the British to the territory was in some doubt. Instead, it was suggested that there be a simple transfer to Canada's jurisdiction of all remaining British possessions in North

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[50] Ibid., pp. 152-155. Colonial Office to Secretary of the Admiralty (January 18, 1879). Draft copy.

[51] Ibid., Vol. 759, pp. 24-25. Admiralty to Colonial Office (January 28, 1879).

[52] Ibid., pp. 26-32. (January 23, 1879).

[53] Ibid., p. 32.

America, whatever they might be. In correspondence with Colonial Minister Hicks-Beach, Under Secretary Herbert recommended the following,

> I see the objection to legislation very clearly: on the other hand I fear that without it there will be no means of establishing the right of Canada to territories which are believed to be British but the boundaries of which have never been authoritatively defined.
>
> If a Bill is found to be unavoidable, perhaps it might take the less assailable form of a measure 'to declare that all territories and places in North America now belonging to the Crown, but not hitherto specially included within the boundaries of the Dominion, shall be so included.'[54]

This would allow the British to transfer to Canada jurisdictional responsibility for the Arctic while bypassing the seemingly impossible task of precisely defining what Arctic territory was British. The idea found favour with Hicks-Beach. British officials, after almost four years, abandoned the precise boundary delimitation of the Arctic archipelago and proceeded with the proposal to pass the transfer with an indefinite boundary description.

Armed with a subsequent report from the Crown's Legal Department,[55] Hicks-Beach contacted the Marquis of Lorne,[56] Lord Dufferin's replacement as Governor General of Canada, suggesting that an Order in Council was indeed sufficient to transfer to Canada jurisdiction for the Arctic territories. Furthermore, the legal advisers of the British Crown stated that the government of Canada had full executive and legislative authority over the Arctic archipelago by virtue of the British North America Act, 1871, as contended by Justice Minister Laflamme.

Still fearing reservations in Canada, Hicks-Beach sent an additional dispatch[57] in which he communicated his fears regarding the use of a Parliamentary Act.

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[54] As quoted in Smith, "Official Correspondence," op. cit., p. 61.

[55] C.O. 42, Vol. 759, pp. 195-198. Law Officers to Hicks-Beach (April 3, 1879).

[56] Ibid., pp. 199-201. Hicks-Beach to Marquis of Lorne (April 18, 1879). Draft copy.

[57] Ibid., pp. 202-203. Hicks-Beach to Marquis of Lorne (April 19, 1879). Draft copy.

> There are obvious reasons which make this Course of action preferable to attempting to secure the same object by the introduction of a Bill into the Imperial Parl't. Questions might be raised in the discussion of such a measure which might, in the great press of business, not improbably lead to the abandonment of the project....[58]

Delay was again at the hands of Canada as its reply was not received in London until more than six months later. The Canadian dispatch of the 5th of November 1879[59] included an Order in Council[60] embodying the memorandum of Sir John A. Macdonald that found the advice of the British legal counsel satisfactory and requested that an Order in Council be used to finally secure the transfer to Canada of jurisdiction for Britain's Arctic territories.

On the 31st of July 1880, the Order in Council transferring jurisdictional responsibility for Britain's Arctic territories to Canada was approved by London.[61] The approved order was sent to the Marquis of Lorne,[62] and published in the *Canada Gazette* on October 9, 1880.[63] Its last paragraph read as follows:

> From and after September 1, 1880, all British territories and possessions in North America, not already included within the Dominion of Canada, and all islands adjacent to any of such territories and possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada; and become and be subject to the laws for the time being in force in the said Dominion, in so far as such laws may be applicable thereto.

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[58] Ibid.

[59] Ibid., Vol. 758, pp. 11-12. Marquis of Lorne to Hicks-Beach (November 5, 1879).

[60] Dominion Order in Council, P.C. No. 88E (November 4, 1879).

[61] C.O. 42, Vol. 764, p. 329. A search for the source and publication date of the Order in Council in Britain was unsuccessful. Irene Lam, Researcher for the National Library of Canada, located the Order in only the Canada Gazette and in the "Colonial Office Papers." (613) 996 7433.

[62] Ibid., p. 330. Kimberley to Marquis of Lorne (August 16, 1880). Draft copy.

[63] Imperial Order in Council (July 31, 1880); King, op. cit., p. 10.

The formal proceedings to transfer Britain's Arctic claims to Canadian jurisdiction had been completed. Her Majesty's Government in London had turned over administrative responsibility for the Arctic territories to Her Majesty's Government in Ottawa.

Comments on the Negotiation and its Outcome.

I. The transfer of jurisdictional responsibility for Britain's Arctic territorial possessions to Canada took more than six years to complete. Accountability for the lengthy proceedings lies partly with the apparent ambivalence to the transfer on the part of Canada. This is particularly evident in view of Carnarvon's stern warning after three years of Canadian inactivity: the response of Dominion officials was to let the matter fall into abeyance due to the lack of any apparent threat.

However, Canada's indifference was not unreasonable. Prior to Britain's offer to transfer jurisdiction over its Arctic possessions to Canada, the Dominion exhibited little interest in the region, nor was it involved in any way with the Arctic. Furthermore, the recent and dramatic growth of the nation inevitably diverted the attention of the government to internal matters of greater priority.

Considerable time was also spent in the determination of the territories to be transferred to Canadian jurisdiction, and the appropriate method by which to effect the transfer.[64] It was not until shortly after Frederick Evans' report of January 23, 1879, that officials abandoned the precise territorial delimitation and began working towards an indefinite transfer. As for the method of transfer, more than four years had transpired before Hicks-Beach began advocating the use of an Order in Council, as opposed to an Act of the Imperial Parliament, and further time elapsed as the respective governments remained at odds over the method's legitimacy.

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[64] Smith, "Official Correspondence" op. cit., p. 69.

II. The eventual abandonment of Lord Carnarvon's intentions that the territory to be administered by Canada be precisely defined, and that the transfer be approved by an Act of the British Parliament appears to be largely due to the uncertainty surrounding Britain's Arctic claims.

Britain's title to its Arctic possessions was derived through three centuries of exploration. These claims, based on acts of discovery and appropriation, often encompassed vast territories, much of which was frequently neither seen nor set foot upon by the claimants. Furthermore, the majority of Britain's claims in the North were not "ratified by state authority... [nor] ...confirmed by exercise of jurisdiction..."[65] Hence, the reliability of Britain's claims came to be questioned, with the result that the precise boundary delimitation proved to be an impossible task for British officials to manage in any satisfactory manner. "They could not define, that which in their own minds was indefinite..."[66] and which was still largely unknown.[67] Furthermore, there may have been a genuine reluctance on the part of British officials to claim territory to which the United States might have had a better claim.[68]

Hence, the ambiguity of the 1880 Order in Council transferring all British possessions in North America to Canada's jurisdiction was intentional, as Britain transferred only that which it could. The vaguely worded Order was probably based on the assumption that Canada would perfect Britain's claims and, possibly, extend them to encompass the entire archipelago,[69] at a later date, or as circumstances dictated.

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[65] King, op. cit., p. 8. King, in fact, asserts that none of the acts of discovery and appropriation were ratified or confirmed by Britain. This thesis, however, will argue that Britain did exercise its authority over the Hudson Bay region prior to the transfer. See below, Chapter 2.

[66] Holmden, op cit., p. 12.

[67] Ibid.

[68] Smith, "Official Correspondence," op. cit., p. 64.

[69] Ibid.

Passage of the transfer by an Act of the Imperial Parliament also fell into disfavour, probably due to the uncertainties of Britain's title to the Arctic archipelago. From the official correspondence, it is apparent that Hicks-Beach sought to avoid public disclosure of the deficiencies with Britain's title. "Questions might be raised in the discussion of such a measure which might...not improbably lead to the abandonment of the project."[70] The possibility, it was feared, of strong public reaction, especially from the United States, could have arisen had Parliament dealt with the matter, producing untenable complications. To avoid such probabilities, procedure by Order in Council--the Monarch's executive power[71]--was adopted and proved to be quiet and expedient; moreover, it encountered few difficulties. By obtaining the Queen's consent (completely by-passing Parliament), Hicks-Beach managed to avoided the unwanted publicity that would have arisen had the matter come under the purview of the House of Commons. Furthermore, although Orders in Council are published,[72] the initial secrecy afforded by the measure meant that any protest concerning the annexation that might have been registered by the United States would have been *ex post facto*, or after the fact. Any challenge the U.S. might have launched would have arisen after the transfer of jurisdiction had already taken effect.

III. The joint address by the Senate and the House of Commons of May 1, 1878, reiterated Canada's commitment to a precise boundary description of the territory to be transferred to its jurisdiction, and to the approval of the transfer by an Act of the British Parliament. The eventual acceptance of the indefinite territorial delimitation and the use of an Order in Council to conclude the matter appears to contradict Canada's insistence that all doubt to the transfer be removed.

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[70] C.O. 42, Vol. 759, p. 202-203.

[71] O. Hood Philips, *Chalmers and Hood Philips' Constitutional Laws of Great Britain*. 6th Ed. (London: Sweet and Maxwell, Limited, 1946), pp. 31-32. The Orders are generally drafted by or on behalf of Government departments and are given assent, without recourse to Parliament, by the Monarch.

[72] The Imperial Order in Council transfering Britain's Arctic title claims to Canada was approved on July 31, 1880. It was subsequently published in the Canada Gazette on October 9, 1880. See notes 61-63, above.

There is little in the official correspondence to explain the change in attitude regarding the territorial description. The most likely conclusion appears to be that Canada may have recognized the limitations in precisely defining that which was uncertain, and still largely unknown.[73] It is also reasonable to conclude that the territorial description was not of paramount importance to Canada as it was the most malleable feature of the transfer, open to such modifications and changes as were deemed necessary.

Hence, of far greater significance for Canada was the eventual endorsement of the Order in Council to conclude the transfer. Even though Canada and Britain remained divided as late as October 1878 as to the method's legitimacy, the subsequent report of the British legal officers allayed Canada's reservations. The affirmation of the validity of an Order in Council to conclude the transfer, and the acknowledgement that the provisions contained in the BNA Act of 1871 did indeed extend to Canada full executive and legislative authority over Britain's Arctic territories, resolved Canada's doubts. It appears, then, that Canada's insistence that all doubt about the transfer be removed was chiefly concerned not with the nature of Britain's claims, but rather with the level of control Canada was to be allotted.

IV. There is little to doubt the validity of the transfer.[74] Britain voluntarily transferred jurisdiction over its Arctic territories to Canada; to this transfer Canada agreed, with the accompanying duties and responsibilities.

In light of the official correspondence, the contention that doubts as to the legality of the transfer resulted in Canada's failure to officially recognize the transfer and to incorporate the territory within the Dominion[75] seems to be unfounded. The Dominion Order in Council of the 5th of November 1879 contained a memorandum by Prime Minister Macdonald that found the opinion of the British legal counsel satisfactory and requested that the transfer be completed by means of an Order in Council. It is apparent that the validity of the transfer was not questioned by Dominion officials, and official acknowledgement of the transfer was undoubtedly deemed as unnecessary in light of the finality of Macdonald's request.[76]

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[73] Holmden, op. cit., p. 18.

[74] A more thorough examination of the legal question arising from the transfer will be offered in the following chapter.

Furthermore, concern that the use of an Order in Council failed to compel formal recognition of the transfer by other countries[77] and thus called the transfer into question, results from a misunderstanding of what the transfer entailed. Since Canada was not yet independent, the transfer of jurisdictional responsibility for Britain's Arctic territorial possessions to Canada was simply a change in the exercise of administrative control. The territory remained under British sovereignty, but the task of administration was passed to Canada. The Arctic territories remained part of Her Majesty's dominions, but Her Representatives in Ottawa were now to administer the region, formerly overseen by Her Government in London. International recognition and acceptance of the transfer were not required as the territory did not pass to the sovereign control of another state.

Regarding the uncertainty surrounding the extent of the territories encompassed within Britain's Arctic claims, difficult questions could have been raised. However, it is only to the islands in the northern reaches of the archipelago that foreign claims might have proved superior to those of the British. Furthermore, Britain's appropriation of its Arctic territories was consistent with the practice of states in general. It was not until the mid-nineteenth century, when British claims had largely been established, that effective occupation was coming to be recognized as necessary to secure sovereign title. Moreover, even though acts of discovery and appropriation ceased to be accepted in international law as securing title to unclaimed territory,[78] the law nonetheless regarded "discovery" as sufficient to fix an inchoate title--a temporary period in which to complete title with effective occupation.[79] With, at minimum, an inchoate title, Canada would have the opportunity to complete British claims with the effective exercise of jurisdiction were they to be challenged.

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[75] King, op. cit., p. 8. Apparently, King did not have all the relevant documentation at his disposal which may account for certain oversights.

[76] Holmden, op. cit., p. 23.

[77] Zaslow, op cit., p. 254.

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[78] Smedal, op cit., pp. 14-16.

[79] Ian Brownlie, *Principles of Public International Law*. Third Edition. (Oxford: Clarendon Press, 1979), pp. 149-150.

2. The Legal Issues Concerning The 1880 Transfer.

On September 1, 1880, with the political impediments laid to rest, and the final agreement officially concluded, the Dominion of Canada assumed the role of administrator of Britain's Arctic territorial possessions. Canada's new-found jurisdictional authority, however, remained somewhat problematic. The ambiguity of the 1880 Agreement--the product of uncertainty regarding Britain's legitimate Arctic claims--cast doubt upon what actually was transferred to Canada.

The central focus of this chapter, therefore, is to determine what was transferred by Britain to Canada in 1880, regarding the extent of the territories included in the annexation and the legal rights and responsibilities assumed by Canada. To do so first of all requires an examination of the rights Britain possessed to the Arctic territories. Since Canada's authority was seen to rest upon the rights acquired to the region by Britain, it must be assessed whether Britain had secured sovereign title to those Arctic territories in the first place. It stands to reason that Britain could transfer to Canada only those rights that it in fact possessed.

To come to a definitive statement regarding the legal status of Britain's Arctic claims, one must consult international law--the legal order that governs the intercourse of states. It is first necessary to come to an understanding of the concept of sovereignty as it has developed in international law, and then to determine the means and methods by which sovereign title to territory is secured.

According to the conventional, long-standing understanding ordered by international law, the acquisition of title to territory is exclusively limited to states. This discrimination is the foundation for the very nature of the sovereignty of states.

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any State, the function of a State. The development of the

> national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.[1]

By virtue of its sovereignty, the state is supreme within its established territorial limits. Generally speaking, the state possesses both the authority and the power to decide all matters that affect its territory.

Before continuing with this line of examination, however, one must examine the recent claims and demands put forth by a number of Canada's aboriginal communities.[2] Even though their call for sovereign status and the right to self-government is a recent phenomenon that has come to challenge the concept of sovereignty as understood by international law, an assessment of these demands at this time is in order, for if their claim to sovereignty is valid, that is to say, established in the eyes of international law, Britain could not have had the right to cede the Arctic archipelago to Canada.

Furthermore, there is growing support for the native cause, especially in the western democracies, by those sympathetic to their plight, and those hoping to lessen the costs of the welfare net that has seemingly become a mainstay of the native livelihood. As well, the aboriginal demand for special status and rights is being bolstered by the contemporary movement in Canada that advocates greater minority and group rights that are often at the expense of the community as a whole, an issue that has also become of increasing importance to such international forums as the United Nations.[3] Even though native aspirations remain at odds with international law regarding principles of sovereignty and statehood, if current trends continue, it is conceivable that a time may come when the conventional order maintained by international law will be altered. This holds potentially ominous implications not only for Canada, but also for the entire community of states. Hence, it is to the discussion of native demands that this chapter first turns.

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[1] *Palmas Case*, op. cit.,p., 838.

[2] This assessment is limited to the Canadian experience, though similar concerns and aspirations are being voiced by native communities world wide.

[3] Natan Lerner, *Group Rights and Discrimination in International Law*. (Dordrecht: Martinus Nijhoff Publishers, 1991), p. 99.

Aboriginal Rights and International Law.

The rights of Canada's aboriginal communities have become an enduring issue of federal and provincial politics. Recent attempts to address native demands and redress the failings of Ottawa's "fiduciary trust"[4] have included land grants, financial compensation and the promise of self-government, though within a domestic context. The most recent example is the proposed Nunavut territory in Canada's Arctic concerning approximately 18,000 Inuit.[5]

Some of the most prominent of native lobbies such as the Assembly of First Nations, however, are less compromising in their demands. Frequently arguing that an alien legal order, derived from western European concepts of justice, was imposed upon them by foreigners, such native groups deny that they are beholden to the national and provincial legislatures for their political status and legal rights. Rather, these groups contend, they are the true sovereigns of the land[6] and are entitled to self-government by virtue of their inherent right as aboriginal peoples.[7]

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[4] Brian Slattery, "Understanding Aboriginal Rights." 66 *The Canadian Bar Review* (1987), p. 736. The management of native interests by government is said to be a situation based in law according to some lawyers concerned with the rights of aboriginal peoples. This perspective asserts that government holds the position of "trustee." For an opposing opinion, see: L.C. Green, "North America's Indians and the Trusteeship Concept." 4 *Anglo-American Law Review* (1975), p. 137.

[5] "Ottawa agrees to new territory," *The Globe and Mail*, Tuesday December 17, 1991; "Inuit, gov't strike land deal," *The Edmonton Journal*, Tuesday December 17, 1991.

[6] For example, David Ahenakew, former National Chief of the Assembly of First Nations: "...[W]e have never relinquished our total sovereignty to any other power on earth." "Correspondence," 61 *Canadian Bar Review* (1983), p. 920.

[7] Regarding the deal between the Inuit and the federal government concerning the territory of Nunavut, Ovide Mercredi, Chief of the Assembly of First Nations, commented that the Inuit should have reserved their inherent right to self-government as part of the deal. *The Edmonton Journal*, op. cit. There is some uncertainty as to whether these native communities regard self-government as synonymous with sovereign independence.

The native demand for self-government, though problematic, is not nearly so contentious as the call for sovereign status. Within the national context, attempts at defining this concept, and attaching political and legal rights to it, have yet to come to fruition, and have usually been putoff for future study. The Nunavut Agreement,[8] however, has made encouraging gains in this regard with Ottawa's commitment to self-government for the Inuit. According to Article 4 of the Agreement,

> The Government of Canada will recommend to Parliament...legislation to establish, within a defined period, a new Nunavut Territory, with its own Legislative Assembly and public government, separate from the Government of the remainder of the Northwest Territories.[9]

Regarding Nunavut political development, the Agreement continues,

> ...Canada and the Territorial Government and the TFN (Tungavik Federation of Nunavut) shall negotiate a political accord to deal with the establishment of Nunavut....The political accord shall also provide for the types of powers of the Nunavut Government, certain principles relating to the financing of the Nunavut Government, and the time limits for the coming into existence and operation of the Nunavut Territorial Government.[10]

Although the powers of the Nunavut Government have yet to be determined, a commitment to Inuit self-government exists. In exchange for the recognition of Canada's sovereignty over the Nunavut territory, the Inuit are to acquire a separate system of government that will enable them to better protect and preserve their culture and heritage.

Nevertheless, given the demand for sovereign status, enunciated by some aboriginal groups, the idea of self-government takes on far greater implications. It would appear that these native communities aspire to independence and the powers of statehood.

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[8] Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty in Right of Canada. (Ottawa: Department of Indian Affairs and Northern Development, 1992).

[9] Ibid., Article 4.1.1, p. 23.

[10] Ibid., Article 4.1.2, p. 23.

Traditionally, international law has regarded aboriginal populations as subjects of the state upon whose land they dwell. While they may be seen to have certain domestic or municipal powers, native communities have been accredited with no status or legal personality approaching that of a state or sovereign. A number of judicial decisions attest to this position.

In 1933, the Permanent Court of International Justice in the *Legal Status of Eastern Greenland*,[11] rendering judgement on the competing claims of sovereignty of Norway and Denmark, had an opportunity to decide on the extent to which aboriginal inhabitants could extinguish the sovereign title of a state. The court held that,

> It has been argued on behalf of Norway that after the disappearance of the two Nordic settlements, Norwegian sovereignty was lost and Greenland became a *terra nullius*.[12] Conquest and voluntary abandonment are the grounds on which this view is put forward.
>
> The word "conquest" is not an appropriate phrase, even if it is assumed that it was fighting with the Eskimos which led to the downfall of the settlements. Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them sovereignty over territory passes from the loser to the victorious State. The principle does not apply in a case where a settlement has been established in a distant country and its inhabitants are massacred by the aboriginal population.

By the opinion of the Court, the loss of sovereignty by means of force can occur only when two states are at war with one another. Since the resident Eskimos did not constitute a sovereign entity or state, they could not terminate Denmark's sovereignty with the supposed destruction of the two Nordic settlements.

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[11] *Legal Status of Eastern Greenland* (1933) Permanent Court of International Justice (P.C.I.J. Publications, Series A/B, Vol. 2, No. 53), 22, at 46-47.

[12] Land without a sovereign; open to annexation by any state.

In the *Cayuga Indians* [13] claim, the legal status of the Indian "nation" was but one issue considered by the Anglo-American Arbitral Tribunal in its judgement concerning the nature of the treaty between the Cayugas and the State of New York:

> The obligee was the "Cayuga Nation," an Indian tribe. Such a tribe is not a legal unit of international law. The American Indians have never been so regarded....From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied. They have been said to be "domestic dependent nations," [14] or "States in a certain domestic sense and for certain municipal purposes."[15] The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive. "No other power could interpose between them."[16] *So far as the Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as the law recognizes it* .

Even though native communities are seen to hold certain powers of state for domestic or municipal purposes, ultimately, their legal status rests in the hands of the sovereign to whom they are subject. The decision of the Tribunal is unequivocal with regard to sovereign status. It simply denies native communities the legal personality traditionally conferred upon states.

In the acquisition of sovereign title to territory, the fact that an indigenous people already inhabited a territory in question was largely inconsequential. An aboriginal community was of no legal significance for international law unless it in fact possessed an organized form of government whose rights had to be recognized. In response to Spain's assertions that its claims to title were effected on the basis that the territory in question was terra nullius, the International Court of Justice, in the *Western Sahara*[17] case ruled that regions inhabited by aboriginal peoples with social and political organizations could not be regarded as terra nullius. The acquisition of sovereignty over such regions was instead effected through agreements concluded with local rulers since these peoples in fact possessed governmental structures whose rights had to be recognized.[18] The Court, however, denied that such aboriginal communities were of sufficient sophistication to constitute sovereign entities since they were generally incapable of fulfilling the responsibilities demanded of states as members of the community of nations.

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[13] *Cayuga Indians* (1926); 6 United Nations, Reports of International Arbitral Awards, 173, at 176.

[14] *Cherokee Nation v.Georgia*, 5 Peter's United States Supreme Court Reports (1828-42), 1, at 17.

[15] *Holden v. Joy*, 17 Wallace's United States Supreme Court Reports (1865-76), 211, at 242.

[16] *Johnson v. McIntosh*, 8 Wheaton's United States Supreme Court Reports (1816-27), 543, at 578. (Emphasis added.)

> In the present case, the information before the Court discloses that, at the time of the Spanish colonization, there existed many ties of a racial, linguistic, religious, cultural and economic nature between various tribes and emirates whose peoples dwelt in the Saharan region which today is comprised within the Territory of Western Sahara and the Islamic Republic of Mauritania. It also discloses, however, the independence of the emirates and many of the tribes in relation to one another and, despite some forms of common activity, the absence among them of any common institution or organs, even of a quite minimal character. Accordingly, the Court is unable to find that the information before it provides any basis for considering the emirates and tribes which existed in the region to have constituted, in another phrase used by the Court in the *Reparation case*, "an entity capable of availing itself of obligations incumbent upon [the] Members [of the United Nations]."[19]

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[17] *Western Sahara* , (1975) International Court of Justice, at 6.

[18] Ibid., p. 39. The nature of these agreements is examined in the *Palmas Case*, op. cit., p. 858: "From the time of the discoveries until recent times, colonial territory has very often been acquired, especially in the East Indies by means of contracts with the native authorities, which contracts leave the existing organisation more or less intact as regards the native population, whilst granting to the colonizing Power, besides economic advantages such as monopolies or navigation and commercial privileges, also the exclusive direction of relations with other Powers, and the right to exercise public authority in regard to their own nationals and to foreigners. The form of the legal relations created by such contracts is generally that of suzerain and vassal, or of the so-called colonial protectorate. In substance, it is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy for the natives. In order to regularise the situation as regards other States, this organisation requires to be completed by the establishment of powers to ensure the fulfilment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations."

[19] Ibid., p. 63.

Although it concurs with the rulings cited above, the *Western Sahara* decision is also noteworthy for its adroit illustration that sovereign status is not simply the result of abstract legal reasoning, but is based largely on concrete political considerations.[20] To be conferred with sovereign status, an entity must manifest sovereign power and authority, or, in other words, prove itself worthy of such status with the capability of exercising the rights and duties expected of states by international law. In its denial of sovereign status for the aboriginal peoples of the Western Sahara region, the Court found the political development of these communities was primitive in comparison with that of states. Since these peoples were incapable of availing themselves of obligations incumbent upon all members of the community of nations, they were unworthy of sovereign status. Simply put, these aboriginal communities did not possess the requisite capabilities to be treated as a sovereign entity or state.

As distasteful as this may be to liberal sensitivities, the *Western Sahara* ruling proves particularly applicable with regard to the contemporary debate in Canada regarding native sovereignty. Like their Saharan counterparts, though Canada's native communities are, to a great extent, geographically, culturally and politically distinct, they have yet to conduct themselves as a united political entity that is fit for sovereign status.

It seems to matter little, however, that international law is specific as to what constitutes sovereignty and to whom the associated rights and responsibilities apply. Some champions of native sovereignty and self-government have chosen simply to side-step this obstacle, redefining the principle and tailoring it to serve their purposes and ends.[21] One such redefinition holds that "...First Nations *sovereignty* is a term used to describe the totality of powers and responsibilities necessary or integral to the maintenance and reproduction of aboriginal identity and social organization."[22] Regarding the definition's interpretation, the authors contend,

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[20] With regard to the nature of the law creating process in international law, Huber, in the *Palmas* decision, writes: "Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited the effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations." *Palmas Case*, op.cit., p. 839.

[21] It may be argued that Europeans were guilty of a similar offense, defining the principle of sovereignty to serve their purposes. The principle, however, is no longer representative of European rights and responsibilities alone, but has become a base principle for the international community as a whole. According to the Charter of the United Nations, Art. 2, Sect. 1: "The Organization is based on the

> Under an inherent rights theory, First Nations sovereignty and aboriginal forms of government, as the means by which aboriginal identity and social organization are reproduced, pre-existed the settlement of Canada and continue to exist notwithstanding the interposition of the Canadian state. The Canadian state may choose to recognize aspects of First Nations sovereignty and aboriginal forms of self-government through executive, legislative or judicial action...however, such action is not necessary for the existence of First Nations sovereignty and native forms of self-government, only their recognition in Canadian law.[23]

The recognition of native sovereignty and self-government in Canadian law is seen as necessary in order that it "acquire the status of a right."[24]

On first blush, this depiction of "First Nation sovereignty" appears to be representative of the general demand of Canada's aboriginal communities for special powers for the preservation and maintenance of their culture and heritage. As stated above, such powers of self-government have already been agreed to in principle in the Nunavut agreement. The definition is vague, offering nothing in the way of a description of powers and rights to be associated with native sovereignty that would distinguish it from the general demand for native self-government. Moreover, although sovereign status, as understood by international law, is the goal, no account is given of the need, the desirability, or the feasibility of such status. Without such a comprehensive explanation of

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principle of the sovereign equality of all its Members." Furthermore, only states may be parties before the International Court of Justice.

[22] Michael Asch and Patrick Macklem. "Aboriginal Rights and Canadian Sovereignty: An Essay on R. vs. Sparrow," in *Alberta Law Review*,Vol. 29, No. 2 (1991), p. 503. (Emphasis added.)

[23] Ibid., p. 503.

[24] Ibid., p. 514.

what is meant by native sovereignty, the assertions of Asch and Macklem cannot escape judgement according to the conventional understanding offered by international law.

To recapitulate, sovereignty constitutes independence. The state, by virtue of its sovereignty, possesses the right to exercise the functions of a state, to the exclusion of other states, within its designated territory.[25] The rights and responsibilities associated with sovereign status, however, are not to be viewed merely according to the theoretical interpretation of the law, but they must also be seen for their practical manifestations. To assert that sovereign status is a matter of discrimination based on abstract legal reasoning would be to ignore such practical considerations as a state's political, economic, and military sophistication; these considerations largely determine the capacity of a state to conduct itself as an independent entity within the community of nations.[26]

Asch and Macklem's argument, that the existence of native sovereignty and self-government is historically ordained, neither affected by the interposition of the Canadian state nor dependent for existence upon state action, amounts to a repudiation of the cession of these rights to Canada. As sovereign entities, for all intents and purposes independent in the eyes of international law, native communities would not be subject to Canadian legislation, nor would they be entitled to the rights and privileges accorded by the law to Canadian citizens. What, then, is one to make of Ottawa's fiduciary trust and its 4.42 billion dollar expenditure on aboriginal programs in 1991-92?[27]

Furthermore, the assertion that native sovereignty exists notwithstanding the Canadian state, requiring only recognition in Canadian law, is contradictory. If sovereign status constitutes independence, as international law stipulates, why then would a community require, or desire, recognition in the legal order of a foreign state?[28] To do so would be to deny or renounce one's sovereign status. The benefits of such a situation would have to far outweigh the consequences of surrendering one's independence. With the stipulation that native sovereignty requires recognition in Canadian law, Asch and Macklem's argument in fact implies that native sovereignty is subordinate to, and in acceptance of, Canadian sovereignty.

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[25] See note 2.

[26] *Palmas Case*, op. cit., p. 839.

[27] "Self-government won't cut costs, Indian leader predicts," *The Edmonton Journal*, Saturday February 15, 1992.

Regarding the practical manifestation of sovereignty, native groups naturally aspire to sovereign status for the rights and freedoms it confers, but they are under no illusions as to their means to effect sovereignty. Ovide Mercredi, Chief of the Assembly of First Nations, in a recent statement regarding the cost of native self-government, made no apologies when asserting that the cost to taxpayers would increase rather than decline. "It is going to cost more. Of course. But the cost of carrying on with the status quo would be higher."[29] Since this account of "native sovereignty" does not stand up even to elementary scrutiny, it is apparent that the authors did not intend for it to be associated with the conventional notion of sovereignty in international law. It may be the intent of the authors that native populations be granted powers for self-government that may not be amenable to the present constitutional structure. Nevertheless, in borrowing this principle and refashioning it to support their assertions regarding the right of native self-government, Asch and Macklem take the principle of sovereignty out of context and apply it to a matter for which it was not intended. The authors are guilty of playing fast and loose with language.[30] Such auto-interpretation of the principle of sovereignty not only may lead a fundamental premise of international law to become devalued, but it also confuses the debate and destabilizes the ground upon which to forge some understanding--an understanding which is required in order that the urgent and legitimate needs of our native communities may be met fairly and equitably.

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[28] Although a state requires recognition by other members of the community of nations to attain the status of a state, such an act is not a matter of law, but is a matter of politics.

[29] "Self-government won't cut costs, Indian leader predicts," *The Edmonton Journal*, op. cit.

[30] In fashioning the principle of sovereignty to conform to their understanding of native rights Asch and Macklem appear to use the Humpty Dumpty theory of language:

> "...There's glory for you!"
> "I don't know what you mean by 'glory,'" Alice said.
> Humpty Dumpty smiled contemptuously. "Of course you
> don't--till I tell you. I meant 'there's a nice knock-down
> argument for you!'"

The existing confusion between, on the one hand, the native demand for sovereign status and the right to self-government, and, on the other, the principle of sovereignty in international law may have its origin in a misunderstanding regarding the principle of self-determination contained in the Charter of the United Nations. According to the Charter, chp. 1, art. 2, a purpose of the U.N. is the development of "...friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...." This principle, as presented in the Charter, is contentious because no indication is given as to what is meant by self-determination or peoples.

The idea that this principle might constitute a right in international law [31] first arose with the General Assembly's *Declaration on the Granting of Independence to Colonial Countries and Peoples*.[32] The resolution asserted that "[a]ll peoples have the right to self-determination; by virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development[,]" but it goes on to caution as follows: "[a]ny attempt aimed at the partial or total disruption of the national unity and the

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> "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.
> "When *I* use a word, " Humpty Dumpty said, in rather a scornful tone," it means just what I choose it to mean--nothing more nor less."
> "The question is," said Alice, "whether you *can* make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master--that's all."

Lewis Carroll, *The Complete Works of Lewis Carroll.* (New York: The Modern Library, n.d.), pp. 213-214.

[31] Resolutions of the General Assembly, except those dealing with the daily operation of the U.N. itself, are only recommendations and are not legally binding for U.N. members. See separate opinion of Judge Lauterpacht on *South-West Africa-Voting Procedure*, [1955] International Court of Justice 67, at 115- 116.

[32] United Nations, General Assembly, Resolution 1514 (XV), 1960.

territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." Accordingly, "[t]his would imply that any attempt by a group within a state, as distinct from a colonial people, to assert its right to secede would in fact be contrary to the United Nations' understanding of the right to self-determination."[33] Thus, the stated aspirations of a number of Canada's native communities to exercise the right to self-determination would in fact violate the U.N.'s understanding of this right.

The General Assembly's later *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* [34] upholds the warning of its predecessor:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

It would appear that so long as Canada continues to select its government without such discriminatory distinctions, Canada remains in accord with the stipulations of the U.N. regarding respect for the principle of equal rights and self-determination of peoples.

In crucial respects, then, international law still denies that native communities are subjects of international law. They are not conferred with sovereign status, nor are they considered colonial peoples.

Nevertheless, the international community has not simply resigned itself to the status quo. Over the past decade in particular, a number of international organizations have studied the problems confronting aboriginal populations and have submitted proposals that have attempted to address the concerns and aspirations of these peoples.

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[33] L.C. Green, "Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms." 61 *Canadian Bar Review* (1983), p. 341.

[34] United Nations, General Assembly, Resolution 2625 (XXV), 1970.

For instance, the draft declaration of the Working Group on Indigenous Populations,[35] under the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, includes the right of native peoples "to be free and equal to all other human beings in dignity and rights."[36] Aboriginal groups are to be afforded the same opportunities, respect and rights as all segments of society according to the fundamental rights and freedoms universally recognized in existing international instruments. In addition, the recommendations call for the aboriginal right to promote and develop their respective cultures and identities, including the right to education in their own language and the right to create their own educational institutions.

The International Labour Organization's Convention 169 [37] shares the spirit and intention of its counterpart with its condemnation of discriminatory policies concerning indigenous populations, and also calls for these peoples to "...enjoy the full measure of human rights and fundamental freedoms...."[38] Though more comprehensive in its scope, the Convention deals with such disparate issues as labour standards and penal policy for native criminals. Of particular interest, the I.L.O. Convention confronts the widening socio-economic gap facing native peoples with proposals that call for greater consultative involvement of native people in deciding their future,[39] and increased governmental commitments in providing the necessary means and resources to promote economic development.

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[35] United Nations Document E/CN. 4/Sub.2/1985/22, Annex II.

[36] Ibid., Article 2.

[37] 28 International Legal Materials 1382 (1989).

[38] Ibid., Art. 3, Sect. 1

[39] Regarding the issue of self-determination, the Convention does not afford aboriginal peoples any special status or rights. According to Art. 6, Sect. 1(b): "governments shall...establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them...."

Though not without controversy, these proposals are rather conservative in nature given the contentious character of many aboriginal demands. These international forums, however, are primarily political bodies, like the U.N. itself, and enjoy limited legal personalities. In keeping with the supremacy of state sovereignty in international law, these forums are empowered to make recommendations only. It remains the right of the state to ratify or reject such recommendations.

As frustrating as this situation may be for native peoples, according to international law, they are in fact beholden to the state for their political and legal status. While international forums like the U.N. may play a useful role in expediting change, ultimately this change will come from no other source than the state upon whose land native peoples dwell.

For Canada's native communities, for native communities world-wide, it is to the sensitivity and sensibleness of the nation that they must appeal to gain the political and legal means to decide their future and safeguard their culture and heritage. Given the concern in Canada for the recognition of group rights, given the implications arising from the Nunavut Agreement, and in light of the recent commitment to entrench self-government as an inherent right of aboriginal peoples in Canada's constitution, the tide of change has shifted in their favour. Self-government has become a distinct possibility on which Canada's aboriginals may rest their hopes and aspirations.

Sovereign status, however, remains the exclusive preserve of the state. The state possesses the requisite means to perform the functions of a state, to the exclusion of other states. Simply put, the state, by virtue of its power and authority, is able to meet the obligations incumbent on all members of the community of nations.

Britain's Arctic Claims and International Law.

With states possessing exclusively the right to secure sovereign title to territory according to international law, it remains to be discerned whether Britain exercised the requisite means to secure title to the Arctic territories that it claimed as its own.

Regarding the means and methods of acquiring sovereignty title to territory, during the age of discovery Europe's colonizing powers consistently used discovery and symbolic appropriation as the basis by which to secure title claims to the previously undiscovered and unclaimed territories of the Americas.[40] As previously mentioned, a succession of British explorers discovered many of the islands of the Arctic archipelago between the late 16th and early 19th centuries. Claiming these territories on behalf of the Crown, they appropriated the lands with symbolic acts of possession: usually the planting of proclamations of acquisition in rock cairns.[41] This method of territorial acquisition--discovery verified by some sign of appropriation--was consistent with the practice of states.

By the mid 18th century, however, discovery came under attack due to its intrinsic flaws. The imprecise nature of the principle, because it allowed states to appropriate territory without specifying the size of the region, often resulted in unjustifiably large claims, and these claims were preserved from foreign encroachment with only symbolic gestures of the claimant state's sovereign authority.

> When occupation is based on discovery and an entirely fictitious act of appropriation, it is very difficult to state the boundaries of the areas occupied. It has at all times been a temptation for occupying States to make great claims on a basis which does not justify such claims. A good illustration of this was England's claim of sovereignty to North

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[40] See chapter 1, note 9.

[41] The form of these symbolic acts of possession varied somewhat from state to state. In temperate zones where timber was available, crosses were usually erected, often adorned with the arms of the sovereign, as a sign of a claim of title. See: Green and Dickason, op. cit., pp. 7-17.

> America, which was based on the fact that Caboto in 1497 had sailed along the American coast from 56° to 38° N.,' although he had only been ashore at a few places.[42]

In answer to these charges, legal scholars advocated the principle of *effective occupation*: a territory must be taken into real and effective control in order that a legitimate claim of title may be conferred upon a state. According to Vattel, one of the "classicists" of international law, "...the Law of Nations will only recognize the *ownership* and *sovereignty* of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them."[43] Thus, the fundamental distinction separating discovery from effective possession lies with the manifestation of state sovereignty. The former relies on symbolic acts to effect the appropriation of territory, while the latter demands the actual exercise of authority within the acquired territory.[44]

State practice was slow to adopt the notion.[45] It was not until sometime in the mid 19th century that effective possession came to subvert discovery.[46] Although discovery was still capable of conferring an inchoate title,[47] it could no longer be relied upon solely to furnish sovereign title.

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[42] Smedal, op. cit., p. 15.

[43] Vattel, op. cit., p. 85.

[44] The principle of effective occupation has since undergone considerable interpretation, which will be examined in greater depth in Chapter 4.

[45] Before the classicists of international law began advocating the principle, effective occupation was occassionally used in diplomatic exchanges where territorial acquisitions were in dispute. It was not until the mid 19th century, however, that the principle represented the generally accepted legal norm amongst the community of nations. See: Green and Dickason, op. cit., pp. 10-11; Ivan L. Head, "Canadian Claims To Territorial Sovereignty in the Arctic Regions." 9 *McGill Law Journal* (1962-63), pp. 200-201.

[46] It is difficult precisely to determine when a legal concept is established by customary usage as a principle of international law. Simply stated, customary law exists when the general practice of states indicates that a certain act or behaviour is accepted as the legal norm. For the law creating process in international law, see for example: L.C. Green, *International Law: A Canadian Perspective.* (n.p.: The Carswell Company Limited, 1988), p. 56; Georg Schwarzenberger and E.D. Brown, *A Manual of International Law*, 6th Ed. (Milton: Professional Books Limited, 1976), pp. 21-28. That effective possession had been established as a principle of international law according to the practice of states was confirmed with the 1884 African Conference whereby the European maritime states and the United States set out the conditions that were to be applied for new occupations on the African continent. Even though the convention applied strictly to new occupations on the African continent and was only binding on those powers ratifying the convention, it nonetheless reflected the demands as regards effective occupation stipulated by state practice. Smedal, op. cit., p. 20.

> International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty....[48]

In light of this change in the rights of discovery, it remains to be discovered how Britain's claims based on discovery are to be reconciled with the demand of international law that the possession of territory is to be effective and real. The answer lies with "so-called intertemporal law."[49] In weighing the competing claims of the Netherlands and the United States with regard to the sovereign acquisition of the Island of Palmas, Judge Huber asserts,

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[47] An inchoate title is an incomplete title claim. In order for sovereign title to be secured, the territory must be brought under the effective control of the claimant state within a "reasonable" time. Although it has been suggested that a period of twenty-five years should be allowed for the effective occupation of a territory under inchoate title, international law has not established any deadline. What may be construed as a "reasonable time" for the perfection of an inchoate title will depend upon such factors as the difficulty in establishing control, the relation of other states to the territory in question and the need for government control and administration in the region. See: M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law.* (New York: Negro Universities Press, 1926), pp. 136-137; William Edward Hall, *A Treatise on International Law.* (Oxford: Oxford University Press, 1917), p. 105; John Westlake, *The Collected Papers of John Westlake on Public International Law.* Ed. L. Oppenheim. (Cambridge: The University Press, 1914), pp. 166-167.

[48] *Palmas Case*, op. cit., pp. 845-846.

[49] Ibid., p. 845.

> As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case...a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestations, shall follow the conditions required by the evolution of the law.[50]

One is to distinguish between the creation of a right on the one hand, and the continued existence of the right on the other. Thus, the determination of whether or not Britain created legitimate title claims in the Arctic archipelago is to be judged according to the law in force at the time the claims were made. However, for these rights of possession to continue to exist, the claims were subject to the conditions established with the evolution of the law.

There is little doubt that Britain created legitimate title claims to the lands of the archipelago uncovered by British explorers. Regardless of the possible presence of any aboriginal peoples, the territory was legally *terra nullius,* or without an owner, until the arrival of the British, and, consistent with the practice of other colonizing states, the islands were appropriated with acts of discovery. Furthermore, Britain's exploratory activities in the region had almost entirely ceased before the institution of effective possession as the rule of law.

As for the continuing existence of Britain's title claims in the Arctic, it may be said at the outset that physical manifestations of effective occupation such as the establishment of settlements or the regular policing of the region against acts of lawlessness were not forthcoming. This does not prove, however, that Britain was negligent in satisfying the stipulations of effective possession because the unique character of the region posed problems that were not readily amenable to common manifestations of sovereignty. Just as the lack of timber affected Britain's symbol of appropriation, so too did the Arctic's hostile and often impossible environment and its sparse and scattered population affect the actual exercise of Britain's authority. It stands to reason that the circumstances of a particular situation must be taken into account when determining the constituent elements of effective possession necessary to secure sovereign title. That international law concurs with this notion is established by two leading judicial decisions. In reference to the Island of Palmas case, "[t]he fact that a State cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. Each case must be appreciated in accordance with the particular circumstances."[51] With regard to sparsely populated or unsettled regions, Judge Huber added,

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[50] Ibid.

> Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved....[52]

Furthermore, the Permanent Court of International Justice, in the *Eastern Greenland* case, ruled,

> [I]n many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that ...[an]other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.[53]

Evidence of the effective administration over such territories as the Arctic will necessarily be weaker. Thus, Britain's exercise of sovereignty cannot be judged according to the same criterion as that which may be expected in more temperate regions.

In the *Eastern Greenland* decision, the Court qualified the requirements of effective possession with the contention that two requisite features must be shown to exist in order positively to assert the continued display of state authority. The intention and will to act as sovereign must be exhibited, accompanied by some act of authority indicative of this commitment.[54] As for an act of authority sufficient to portray such intention and will, the Court contends that legislation is one obvious form.[55] Fundamentally, then, a clear indication of the intention to exercise jurisdiction to the exclusion of others, and the real exercise of authority in some substantive form is decisive in establishing the sovereign acquisition of territory.

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[51] Ibid., p. 855.

[52] Ibid., p. 840.

[53] *Eastern Greenland Case*, op. cit., p. 46. See also: The Minquiers and Ecrehos Case (1953) International Court of Justice, 47.

Britain illustrated the intention and will to act as sovereign over its Arctic claims long before the archipelago was deeply penetrated by British exploration, and long before the principle of effective possession was established in international law. On the 2nd of May 1670, Charles II incorporated the Hudson's Bay Company and, in exchange for the exclusive charter to all trade and commerce in the Hudson Bay region, empowered the charter company to act on the Crown's behalf in the administration of this territory.

This action by Charles II was not unique. It was common practice between the 16th and 19th centuries for states to grant charter companies executive powers for the administration of colonial territories. Acting on behalf of the state to which they were subject, these companies were responsible for the exercise of sovereign authority in the region in question, usually in exchange for the exclusive right to all trade and commerce of the region. In examining the Dutch East India Company with regard to its influence over the Island of Palmas, Judge Huber wrote,

> The acts of the *East India Company* ...in view of occupying or colonizing the regions...must, in international law, be entirely assimilated to acts of the Netherlands State itself. From the end of the 16th till the 19th century, companies formed by individuals and engaged in economic pursuits (Charter Companies), were invested by the State to whom they were subject with public powers for the acquisition and administration of colonies. The Dutch East India Company is one of the best known. Article V of the Treaty of Munster and consequently also the Treaty of Utrecht clearly show that the East and West India Companies were entitled to create situations recognized by international law....The conclusion

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[54] *Eastern Greenland Case*, op. cit., p. 45.

[55] Ibid., p. 48.

> of conventions, even of a political nature, was by Article XXXV of the Charter of 1602, within the powers of the Company. It is a question for decision in each individual case whether a contract concluded by the Company falls within the range of simple economic transactions or is of a political and public administrative nature.[56]

Although the Hudson's Bay Co. is best known for its control of the lucrative trade in furs, provisions of the Royal Charter make clear that the company was more than simply a commercial enterprise. The Hudson's Bay Co. was appointed as the de facto government of the territory.

> WEE HAVE given granted and confirmed And by these presentes for us our heires and successors DOE give grant and confirme unto the said Governor and Company and theire successors the sole Trade and Commerce of all those Seas Streightes Bayes Rivers Lakes Creeks and Sounds in whatsoever Latitude they shall bee that lye within the entrance of the Streightes commonly called Hudsons Streightes together with all the Landes Countryes and Territoryes upon the Coastes and Confynes of the Seas Streightes Bayes Lakes Rivers Creeks and Sounds aforesaid which are not now actually possessed by any of our Subjects or by the Subjects of any other Christian Prince or State....[57]
>
> FURTHER WEE DOE by these presentes for us our heires and successors make create and constitute the said Governor and Company for the tyme being and theire successors the true and absolute Lordes and Proprietors of the same Territory lymittes and places aforesaid....[58]

Befitting Lords of the land, the officers of the company were entrusted, for all practical purposes, with the power of the state:

> ...the Governor or his Deputy for the tyme being to bee one to make ordeyne and constitute such and soe many reasonable Lawes Constitucions Orders and Ordinances as to them or the greater part of them being then and there present shall seeme necessary and convenient for the good Government of the said Company and all Governors of Colonyes Fortes and Plantacions Factors Masters Mariners

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[56] *Palmas Case*, op. cit., p. 858.

[57] *Charters, Statutes, Orders in Council Etc. Relating to the Hudson's Bay Company*. (London: Hudson's Bay Company, 1931), p. 11.

[58] Ibid., pp. 11-12.

> and other Officers employed or to bee employed in any of the Territories and Landes aforesaid....And that the said Governor and Company soe often as they shall make ordeyne or establish any such Lawes Constitucions Orders and Ordinances in such forme as aforesaid shall and may lawfully impose ordeyne limitt and provide such paines penaltyes and punishmentes upon all Offenders contrary to such Lawes Constitucions Orders and Ordinances....[59] ...And that the Governor and his Councill of the severall and respective places where the said Company shall have Plantacions Fortes Factoryes Colonyes or Places of Trade within any the Countryes Landes or Territoryes hereby granted may have power to judge all persons belonging to the said Governor and Company or that shall live under them in all Causes whether Civill or Criminall according to the Lawes of this Kingdome and to execute Justice accordingly....[60]

Furthermore, with regard to military matters or acts of war,

> ...WEE DOE GIVE and grant unto the said Governor and Company and theire Successors free Liberty and Lycence in case they conceive it necessary to send either Shippes of War Men or Amunicion unto any of theire Plantacions Fortes Factoryes or Places of Trade aforesaid for the security and defence of the same and to choose Commanders and Officers over them and to give them power and authority by Commission under theire Common Seale or otherwise to continue or make peace or Warre with any Prince or People whatsoever that are not Christians in any places where the said Company shall have any Plantacions Fortes or Factoryes....[61]

It is evident from these Royal Charter excerpts that the Hudson's Bay Co. was delegated the responsibility of exercising even the most fundamental powers of state. It was authorized to legislate as it saw necessary, to execute both civil and criminal justice, and to engage in war for the protection and preservation of the territory under its control. Thus, according to the previously cited judicial decision, Britain satisfied the conditions set by international law for the establishment of sovereign acquisition of territory. Britain exhibited the intention and will to act as sovereign over the Hudson Bay territory and appointed the Hudson's Bay Co. as administrator of its colony.[62]

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[59] Ibid., p. 13.

[60] Ibid., p. 18.

[61] Ibid., pp. 18-19.

Although the Hudson's Bay territory was brought under effective control, the remainder of Britain's Arctic claims, the majority of which had yet to be discovered, were not affirmed by state authority nor confirmed by the exercise of jurisdiction. This assertion may come as some surprise given the provision in the Royal Charter that the Hudson's Bay Co. was to exercise Britain's jurisdiction over the specified regions of Hudson Bay,

> ...together with all the Landes Countryes and Territoryes upon the Coastes and Confynes of the Seas Streightes Bayes Lakes Rivers Creeks and Sounds aforesaid which are not now actually possessed by any of our Subjects or by the Subjects of any other Christian Prince or State....[63]

At the time Charles II placed Britain's claims under the authority of the Hudson's Bay Co., nothing was known of the territories lying within the archipelago. Only three decades before, Frobisher was the first Englishman to venture into the region, visiting the Bay on the shores of Baffin Island that now bears his name. Despite this ignorance, it is apparent that Charles II provided for subsequent territorial acquisitions that were to come under the Company's authority. This seems a reasonable extrapolation given Britain's exhaustive and unrivaled exploratory efforts in the archipelago over the next 200 years.

Nevertheless, there is no evidence to suggest that the jurisdiction of the Hudson's Bay Co. was extended northward beyond the limits of the Hudson Bay territory during the Company's two-century reign in Canada. Although the vast regions of Rupert's Land and the Northwestern Territory came under its control, the Company did not exercise authority over the acquired territories of the Arctic archipelago, nor with the renewals of its charter, was its jurisdiction extended to include these lands. Suggestions that Britain's Arctic claims formed part of Rupert's Land and the Northwestern Territory cannot be substantiated since the territorial descriptions of these lands were so vague as to leave their limits in doubt.[64]

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[62] The Hudson Bay territory was a colony of Britain since it constituted a possession of the Imperial government. The territory was discovered and acquired on behalf of the Crown by British navigators. Furthermore, Charles II nominated and empowered the Hudson's Bay Company to act as the government of the territory, subject only to the authority of the British government. By comparison, a colonial protectorate does not constitute a possession of the protecting state, and the protecting state's primary function is to oversee the conduct of the protectorate's foreign affairs. See A.B. Keith, *British Constitutional Law*. 1931 Reprint. (Darmstadt: Scientia Verlag Aalen, 1977), pp. 184-205.

[63] See note 59.

Due to the uncertainty over Britain's Arctic claims, the Hudson's Bay Co. was asked on a number of occasions to present its views on the extent of its jurisdiction in the region. On one such occasion, the Governor of the Company, speaking before a committee of the House of Commons in 1837, suggested "...the power of the Company extends all the way from the boundaries of Upper and Lower Canada away to the North Pole, as far the land goes, and from the Labrador Coast all the way to the Pacific Ocean...."[65] The Governor later admitted, however, that the territory actually under Company jurisdiction was limited to "...all the lands the waters from which ran into Hudson's Bay."[66]

By the Spring of 1873, Britain's Arctic claims, other than that territory under Hudson Bay jurisdiction, had yet to come under effective control. Some of these claims were almost three centuries old and discovery and fictitious appropriation were the sole legal bases upon which Britain's title rested. Whether due to oversight or neglect, the uncertainty over Britain's legitimate entitlements in the Arctic came to haunt British officials.

With the application in 1874 for land concessions by Lt. Mintzer, London finally exhibited the intention and will to assert its sovereignty over all its Arctic acquisitions with the suggested transfer of jurisdiction of these territories to Canada. Although the administrative instrument changed, the colonial government taking the place of the Hudson's Bay Co., the final outcome was the same. The Dominion government, on behalf of the Crown, was to exercise Britain's sovereign authority over its territories in the Arctic archipelago. According to the secret dispatch of Lord Carnarvon to Lord Dufferin,

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[64] King, op cit., pp. 3-4, 7.

[65] Holmden, op cit., p. 7.

[66] Ibid.

> Her Majesty's Government of course reserve for future consideration the course that should be taken in any such case, but they are disposed to think that it would not be desirable for them to authorise settlement in any unoccupied British territory near Canada unless the Dominion Government and Legislature are prepared to assume the responsibility of exercising such surveillance over it as may be necessary to prevent the occurrence of lawless acts or other abuses incidental to such a condition of things.[67]

Although the Order in Council approving the annexation did not include a comprehensive schedule of powers as did the Royal Charter, the powers extended to the Canadian government were extensive. According to the legal advisors of the British Crown, Canada was to exercise full legislative and executive authority over the Arctic territories.[68]

Despite the British intention to assert sovereignty over its Arctic claims, the will of officials wavered in the attempts to provide a definitive territorial delimitation. Initial intentions to claim all the lands of the archipelago to the Pole were subverted by the more conservative suggestion that the boundary description include all the territory of the archipelago to 78°30' north latitude.[69] Had London acted on this proposal, it is likely that Britain would have successfully established sovereign acquisition of the majority of the archipelago since no superior foreign claims were known to exist in this region.[70] Skeptical over the extent of Britain's legitimate entitlements in the Arctic, British officials decided on the indefinite transfer of jurisdiction of all British territories and possessions in

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[67] C.O. 42, Vol. 731, pp. 58-60. See chapter 1, note 18.

[68] See chapter 1, pp. 12, 14 and notes 47-49.

[69] See chapter 1, p. 13 and notes 51-53.

[70] See chapter 1, p. 1, note 2, and p. 2, note 8. With regard to the Arctic territories to 78° 30'N., the only foreign claim was made by an American at the head of Frobisher Bay in 1861. The claim was based on discovery and concerned territory previously claimed by British explorers. "If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title...superior to that which the other State might possibly bring forward against it." *Palmas Case*, op. cit., pp. 838-839.

North America that were not already included within Canada's territorial limits. In so doing, Britain transferred only those rights that she in fact possessed; Britain annexed to Canada its Arctic titles based on discovery. Since international law no longer recognized discovery as securing sovereign acquisition of territory, Canada assumed control of Britain's inchoate Arctic titles. Empowered with full executive and legislative authority, the Dominion of Canada was expected to secure Britain's titles with the effective occupation of these claims, and, perhaps, eventually to extend Britain's authority over the entire archipelago all the way to the Pole.

Although Britain's Arctic claims under inchoate title were not secure, neither were they in serious jeopardy. International law has no fixed deadline for an inchoate title to be perfected. Jurists generally assert that a title based on discovery should be secured by effective occupation within a "reasonable time," but this period is dependent upon the particular circumstances of a situation.[71] Should a foreign power have exhibited interest in land under inchoate title, Canada would have had ample time to react to the threat and perfect Britain's claim.

Britain also was under no obligation to notify states of its dealings with the Arctic. The demand for notification did not arise until the 1885 Africa Conference,[72] five years after the annexation had been completed, and it applied only to the African continent and only to those signatory powers that ratified the Convention.[73] Furthermore, Britain was not giving up its rights in the archipelago, nor ceding its claims to another state. The transfer of jurisdiction was simply an administrative change: the Dominion of Canada,[74] rather than the Hudson's Bay Co., was, on behalf of the Crown, to exercise authority over

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[71] See note 47.

[72] Smedal, op. cit., pp. 40-42.

[73] Ibid., p.20.

[74] In British constitutional law, the term "Dominion" constitutes a British territorial possession that is self-governing with regard to its internal affairs. Keith, op. cit., p. 184.

Britain's Arctic claims. In 1880, Canada was a British territorial possession. With the B.N.A. Act of 1867, Canada was given powers for self-government with regard to its domestic affairs, but London continued to conduct Canada's external affairs. It was not until the Imperial Conference of 1926[75] that Canada obtained its independence from Britain.[76]

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[75] Ibid., p. 163.

[76] It was not until 1931, with the Statute of Westminister, that the Colonial Laws Validity Act (Dominion statutes were void if they conflicted with legislation of the Imperial Parliament) no longer applied to the Dominions. R.M. Dawson, *The Government of Canada*. (Toronto: The University of Toronto Press, 1947), p.63; Keith, op. cit., pp. 164-165.

3. Canada and the Arctic Archipelago in Historical Perspective, 1880-1930.

On September 1, 1880, the transfer complete, Britain's Arctic territorial claims came under the jurisdiction of Canada. It was expected that the Dominion government would eventually secure for Britain those claims whose legal status remained in some doubt. Canada, however, was in no apparent haste to perfect Britain's inchoate titles.

In September 1882, after two years of deliberation, a Committee in Council studying the transfer failed to reach any conclusion regarding an appropriate Arctic policy. Unable to obtain much information on the territory and its inhabitants, the committee concurred with the recommendation of the Minister of Justice that nothing was to be done in the Arctic at the present time.[1] This position was adopted in the Order in Council of September 23, 1882, and dispatched to the Earl of Kimberley, Secretary of State for the Colonies. The Order reads in part as follows: "...that no steps be taken with the view of legislating for the good government of the country until some influx of population or other circumstances shall occur to make such provisions more imperative than it would at present seem to be."[2] Although the government postponed legislative action for the Arctic islands, the Order appears to indicate that the Dominion government had accepted the transfer of jurisdiction and the resulting administrative responsibilities for the region.[3]

Over the next thirteen years, however, Ottawa did nothing to assert its authority in the Arctic. The inchoate status of Britain's claims remained unaltered, and Ottawa made no attempt to define its territorial limits in the archipelago. In addition, foreign exploratory and scientific expeditions were left to operate without authorization,[4] and whalers were allowed to continue with their hunting and trading practices, as they had for centuries, unlicensed and unregulated. It is evident that the Dominion government was content simply to maintain the status quo, strictly adhering to the provision of the 1882 Order in Council that only such action as was deemed necessary for the good government of the region would be forthcoming.

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[1] Holmden, op. cit., pp. 23-24.

[2] Dominion Order in Council, P.C. No. 1839 (September 23, 1882).

[3] Holmden, op. cit., p. 24.

[4] The International Polar Year, 1882, for instance, saw three of fifteen scientific stations established in the archipelago: a German base at Kekerton, Cumberland Sound; a British base at Fort Rae

Until 1895, the only evidence of Canadian activity in the region was the 1884 Gordon expedition. Due to pressures for a transportation system for the shipment of western commodities to the east, Parliament ordered a comprehensive study of the greater Hudson Bay region.[5] Over the study's three year duration, the Gordon team accumulated information on the region's human and animal populations, its geographical and geological formation, but, most importantly, the expedition evaluated the navigational conditions of Hudson Bay and Hudson Strait to determine the feasibility of developing the waterway for commercial purposes.[6]

In the early 1890's, however, the Canadian public grew increasingly concerned for the region and its inhabitants as stories of illegality and immorality wrought by whalers began to surface. Lieutenant-Governor Schultz of Keewatin, for instance, reported that whale stocks were becoming seriously depleted and complained of illicit trade practices that were "violating the revenue laws of Canada, and injuring the trade of a Canadian-English company [Hudson's Bay Co.] who traded with goods upon which duties had been paid."[7]

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on Great Slave Lake; and an American base at Fort Conger on Ellesmere Island. Lieutenant A. W. Greely and party took the opportunity to explore the interior of Ellesmere Island and the west coast of Greenland, while German anthropologist Franz Boas remained at Kekerten to study the geography and native inhabitants of southern Baffin Island after the study site had been abandoned by the German delegation. Zaslow, op cit., pp. 256 - 257.

[5] Canada, House of Commons, Debates, 1884, pp. 203 - 207, 1379 - 1381, 1607, 1617.

[6] Andrew R. Gordon, *Report of the Hudson's Bay Expedition of 1886 under the Command of Lieut. A. R. Gordon, R.N.* (Ottawa: n.p., 1887).

[7] Canada, Interior, Report, 1891, IV, p. 4.

Also, the report of Inspector Constantine of the North West Mounted Police regarding the situation at the mouth of the Mackenzie River asserted,

> [L]iquor is sold or traded to the natives for furs, walrus ivory bone and their young girls who are purchased by the officers of the ships for their own foul purposes.... The presence of an armed government vessel, with a strong and disciplined crew, would do much good service in putting an end to the traffic in liquor to the natives as well as protecting the revenue, and more especially the fisheries which must be valuable or so many ships would not be in these waters.[8]

Furthermore, the testimonials of missionaries were of tremendous influence. One such report refers to Herschel Island as

> ...'the world's last jumping off place'...where no law existed and no writs ran, a paradise of those who reject all restraint upon appetite and all responsibility for conduct; when a dozen ships and five hundred men of their crews wintered here, and scoured the coasts for Eskimo women. I do not think it extravagant to say that the scenes of riotous drunkenness and lust which this island has witnessed have probably rarely been surpassed.[9]

The Dominion government was forced to respond to the public outcry.

In the Spring session of 1894, the matter was put before Parliament by Mr. Mills, Member for Bothwell, who moved for copies of all correspondence since 1867 between Britain and Canada concerning British sovereignty over Hudson Bay. He stated,

> ...I do not understand that any steps have been taken by the Government to assert the jurisdiction of Canada over these waters....[I]f the ships of foreign countries are allowed to go into these waters without question, and without taking out any license, to engage in fishing operations there, it might very well be, at no distant day, according to the rules of acquiescence, that the parties whose ships so engaged might claim to go there, as a matter of right, regarding these waters as part of the high seas.[10]

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[8] Canada, Northwest Mounted Police, Report, 1896, in Sessional Papers, 1897, Vol. II, No. 15, p. 238.

[9] Hudson Stuck, *A Winter's Circuit of Our Arctic Coast*. (New York, Charles Scribner's Sons, 1920), p. 320. Stuck's account comes not from witnessing these acts, but from stories he found no reason to discount.

[10] Canada, House of Commons, Debates, (1894), p. 3276.

The response of the Government was to define its northern territorial limits and formally incorporate Britain's Arctic claims within its domain. On October 2, 1895, by Order in Council,[11] the unorganized and unnamed regions of the North-West Territories were divided into the provisional districts of Ungava, Franklin, Mackenzie, and Yukon. The limits of the Franklin district were set as follows:

> Beginning at cape Best, at the entrance to Hudson strait from the Atlantic; thence westerly through said strait, Fox channel, gulf of Boothia, Franklin strait, Ross strait, Simpson strait, Victoria strait, Dease strait, Coronation gulf and Dolphin and Union strait, to a point in the Arctic sea, in longitude about 125° 30' west, and in latitude about 71° north; thence northerly including Baring Land, Prince Patrick island and the Polynea islands; thence northeasterly to the 'farthest of Commander Markham's and Lieutenant Parr's sledge journey' in 1876, in longitude about 63 1/2° west, and latitude about 83 1/4° north;[12] thence southerly through Robeson channel, Kennedy channel, Smith sound, Baffin bay and Davis strait to the place of beginning.[13]

The district of Franklin, according to the boundary description, encompassed virtually the entire archipelago.[14]

The boundary legislation was a significant undertaking by Ottawa. Although Canada had yet to provide the territory with physical manifestations of its jurisdictional authority, which would be necessary to secure the sovereign acquisition of the region for Britain, Britain's legal hold on its Arctic claims was strengthened since its territorial claims had been incorporated into Canada's official boundary.

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[11] Dominion Order in Council, P.C. No. 2640 (October 2, 1895); See also: "EXTRACT FROM A REPORT OF THE COMMITTEE OF THE HONOURABLE THE PRIVY COUNCIL, APPROVED BY HIS EXCELLENCY ON THE 2ND OCTOBER, 1895," King, op. cit., pp. 11-13.

[12] The narrative of Arctic exploration, attached to W. F. King's memorandum of May 7, 1904, lists the point reached by Markham - Parr as 83° 20' north. King, op. cit., p. 50.

[13] Ibid., p. 12. The Markham - Parr sledge journey was part of the 1875 - 76 Nares expedition.

[14] At the time the boundary legislation was enacted, a number of the archipelago's islands had yet to be discovered and the mapping of the region was neither complete nor exact. Nevertheless, even with the precision of modern cartography, the 1895 Order in Council incorporated virtually the whole of the archipelago into Canada's stated territorial limits.

More striking, however, was the aggressiveness of Canada's action. The Dominion government declared that its boundaries extended to the known limits of the archipelago, an assertion that belied Britain's unwillingness to define precisely the territories annexed to Canada due to uncertainties over its Arctic title claims. Moreover, the boundary delimitation of the Franklin district made no mention of American claims to central Ellesmere island, claims based on discovery[15] that Britain suggested may have been superior to their own.

Canada's boundary legislation, however, did not constitute a fundamental shift in the government's Arctic policy with regard to the effective occupation of the region. Ottawa's failure to begin actively policing the archipelago against the documented illegalities and wrong-doings seems to indicate that the government did not consider these foreign nationals or their actions as a serious threat to Canada's jurisdiction. While counteracting potential charges of acquiescence and neglect, Ottawa's boundary legislation appears to have been equally concerned with appeasing the Canadian public and silencing its critics. At the expense of the region's indigenous population and its resources, Ottawa remained committed to its policy of restraint, acting on behalf of the region only as deemed necessary.

Canada's newly established provisional boundaries proved defective. The boundary descriptions of the 1895 enactment failed to incorporate certain islands, primarily those lying off the mouth of the Mackenzie river, within either of the Yukon, Mackenzie or Franklin districts. The oversight was amended by Order in Council on December 18, 1897[16] with the districts of Yukon and Mackenzie encompassing all islands within twenty miles of the mainland, and the remainder incorporated into the district of Franklin. The reformed boundary description of the northern provisional district read as follows:

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[15] American claims to central Ellesmere Island are founded upon the acts of discovery and possession of Hayes in 1861, although A.W. Greely commemorated his visit to the region in 1882 by raising the American flag on Mount Arthur, and planting a notice of his venture in a rock cairn that was erected near Henrietta Nasmith glacier. King, op. cit., p. 32. As discussed in Chapter 2, acts of discovery and symbolic appropriation could secure only an inchoate title.

[16] Dominion Order in Council, P.C. No. 3388 (December 18, 1897). See also: "EXTRACT FROM A REPORT OF THE COMMITTEE OR THE HONOURABLE THE PRIVY COUNCIL, APPROVED BY HIS EXCELLENCY ON THE 18TH DECEMBER, 1897," King, op. cit., pp. 14-17.

> The district of Franklin...comprising Melville and Boothia peninsulas, Baffin, North Devon, Ellesmere, Grant, North Somerset, Prince of Wales, Victoria, Wollaston, Prince Albert and Banks Lands, the Parry islands and all those lands and islands comprised between the one hundred and forty-first meridian of longitude west of Greenwich on the west and Davis strait, Baffin bay, Smith Sound, Kennedy channel and Robeson channel on the east which are not included in any other provisional district.[17]

Although the eastern and northern limits of the district of Franklin appear unaltered, the western boundary was relocated to the 141st meridian of longitude--an extension of the boundary line separating the Yukon territory from Alaska.

In the summer of 1897, two years since the institution of Canada's territorial limits in the north, and more than a decade after the conclusion of the Gordon study of Hudson Bay, Ottawa sent William Wakeham to the Arctic. Although he was charged with again reporting on the navigational conditions of Hudson Bay, the venture was not solely scientific in orientation. At the Scottish whaling base on Kekerten Island, Cumberland Sound, Wakeham declared Canada's authority over Baffin Island and the Arctic archipelago in general.[18] According to a journal excerpt,

> Tuesday, 17th August. - Landed and hoisted the Union Jack in presence of the agent, a number of our own officers and crew, and the Esquimaux, formally declaring in their presence that the flag was hoisted as an evidence that Baffin's Land with all the territories, islands and dependencies adjacent to it were now, as they had been since their first discovery and occupation, under the exclusive sovereignty of Great Britain. Fog all day.[19]

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[17] Ibid., p. 16.

[18] It seems a reasonable contention that Wakeham's declaration was in conjunction with Canada's 1895 boundary legislation.

[19] Canada, Marine and Fisheries, *Report of the Expedition to Hudson Bay and Cumberland Gulf in the Steamship "Diana" under the Command of William Wakeham in the Year 1897.* (Ottawa: Printer to the Queen, 1898), p. 24.

This was Canada's last administrative act of the 19th century that was concerned with the Arctic.

In its role as administrator of Britain's Arctic territorial claims, it is apparent from the historical record of the first two decades, the Dominion government was reluctant to involve itself with the effective occupation of the region. It did only that which had to be done to retain Britain's title claims. Nevertheless, while Canada's administrative efforts may not have been exemplary given the government's unwillingness to provide the region with physical manifestations of its jurisdictional authority, the government's actions were by no measure inconsequential. During a period when no new foreign claim was established in the region,[20] and no challenge to British claims was registered, Ottawa incorporated all territory of the archipelago to 83 1/4 ° north latitude into Canada's official territorial boundaries. Britain's hold on its Arctic claims was measurably strengthened by the efforts of the Dominion government.

The government's administrative record, however, has been a matter of debate and the subject of considerable scorn, frequently characterized as a period of "governmental myopia."[21] Commentators have charged the government with complacency, disinterest and neglect for its failure to expeditiously perfect Britain's inchoate Arctic titles--territorial claims that remained insecure and susceptible to foreign acquisition. Asserting that Canada was derelict in the handling of its administrative responsibilities in the Arctic, one critic goes so far to contend that Britain's Arctic territories retained a *de facto no man's land* status while Ottawa "let sleeping dogs lie."[22] Indicative of the general sentiment of these nationalist-minded critics, Diamond Jenness states,

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[20] A.W. Greely's "flag raising" activities on central Ellesmere Island in 1882 constituted a reappropriation of the inchoate title established by Hayes in 1861. King, op. cit., p. 32. American jurist Hunter- Miller casts doubt on the validity of these claims, stating: The United States has never officially made any claim to any known Arctic lands outside of our well recognized territory." David Hunter Miller, "Political Rights in the Arctic." *Foreign Affairs*, v. 4 (1925-26), p. 54.

[21] Diamond Jenness, *Eskimo Administration: II, Canada*. (n.p.: Arctic Institute of North America, 1964), p. 7; Ross, op. cit., p. 90.

[22] Zaslow, op. cit., p. 254.

> [T]hey [Canadian authorities] were carrying more important burdens than the remote and useless Arctic. As long as no other country attempted to gain a foothold in that region they were content to forget it and push on with the development of the southern provinces of the Dominion.[23]

Ironically, this condemnation of the Dominion government for its inaction accurately describes the political realities that no doubt influenced Ottawa's thinking. As an entire subcontinent cried out for development, the response of Canada to its administrative duties in the archipelago largely depended "upon the international political climate of the day, in particular the degree to which other nations covet the territory in question or its resources."[24] Ottawa made a conscious, rational decision to restrict its involvement in the north during a time of dramatic and unprecedented national growth. Given its limited financial resources, its more pressing priorities, and in light of the fact that Britain's legal hold on the region was strengthened while no foreign claims were registered, it is not certain that the Dominion government is deserving of criticism rather than commendation for its prudence.

Canada and the Arctic in the 20th Century.

With the turn of the Twentieth Century, pressure for the Dominion government to take effective control of the Arctic continued to mount. Despite its previous administrative actions, a number of occurrences convinced Canadian officials that the country's hold on the region was becoming increasingly tenuous.

The most disturbing event for Canadian officials was the foreign discovery of new land in the archipelago. Lying off the western coast of Ellesmere Island, Axel Heiberg and the Ringnes Islands were discovered and claimed for Norway by the Sverdrup expedition of 1898-1902.[25] Exacerbating Ottawa's anxiety was the unfavourable outcome of the Alaska boundary arbitration,[26] resulting in the reemergence of fears of American encirclement. Although not constituting a serious jurisdictional threat, the crossing of the archipelago by ship by Norwegian explorer Roald Amundsen and the unauthorized use of Ellesmere Island as a base of operation by American Robert Peary in his quest to discover the North Pole further exasperated the Canadian government.

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[23] Jenness, op. cit., p. 16.

[24] Gillies W. Ross. "Canadian Sovereignty in the Arctic: The Neptune Expedition of 1903-1904." *Arctic*, Vol. 29, No. 2 (June 1976), p. 88.

Confronted with the reality that territory within Canada's Arctic jurisdiction was the object of increasing foreign activity, territory that was largely unknown, uninhabited and totally unsupervised by Canada, the Dominion government was forced to concede that its control of the region could no longer be assuredly maintained merely with historic title claims, legislative enactments, and legal arguments. Canada had to assert its jurisdictional authority in the region, providing the territory with concrete manifestations of its control.

In 1903, Canada sent two expeditions to the Arctic: the Neptune expedition to Hudson Bay and the eastern Arctic, and a two-man contingent of the North West Mounted Police to the notorious American whaling base at Herschel Island. Evidently, the government's immediate priority was to establish its control over regions where foreign activity was concentrated. Its ultimate objective, however, was to assert its authority over the entire Arctic archipelago.[27]

Despite its lofty ambitions, the government adopted a prudent, precautionary course of action. So as not to antagonize established interests in the region, Ottawa decided on a quiet and gradual assertion of its jurisdictional authority. Although the media widely speculated that the Neptune expedition was intended as a punitive measure[28]--the *Ottawa Evening Journal* asserting that the expedition's objective was the expulsion of American whalers found fishing in the Arctic waters of the archipelago [29]--the official position of the government was far more timorous. According to the instructions given Superintendent J.D. Moodie, the head of the six man N.W.M.P. detachment accompanying the expedition,

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[25] Otto Sverdrup, *New Land,* 2 vols. Trans. Ethel Harriet Hearn (London: Longmans, Green, and Co., 1904).

[26] *Consolidated Treaty Series*, Vol. 192 (1902-03). (New York: Oceana Publications, Inc.), pp. 336-341.

[27] This contention arises from the correspondence of Wilfred Laurier with Senator W. C. Edwards in 1903. National Archives of Canada, Laurier Papers, p. 78417. Zaslow, op. cit., p. 262.

> The Government of Canada having decided that the time has arrived when some system of supervision and control should be established over the coast and islands in the northern part of the Dominion, a vessel [the *Neptune*] has been selected and is now being equipped for the purpose of patrolling, exploring, and establishing the authority of the Government of Canada in the waters and islands of Hudson bay, and the north thereof.
>
> In addition to the crew, the vessel will carry representatives of the Geological Survey, the Survey Branch of the Department of the Interior, the Department of Marine and Fisheries, the Royal Northwest Mounted Police and other departments of the public service....
>
> *It is not the wish of the Government that any harsh or hurried enforcement of the laws of Canada shall be made. Your first duty will be to impress upon the captains of whaling and trading vessels, and the natives, the fact that after considerable notice and warning the laws will be enforced as in other parts of Canada.* [30]

Moodie was merely to give notification of the impending enforcement of the laws of Canada in the region. It was a conservative first step that was evidently intended to avoid a diplomatic clash with the United States, a confrontation that may have resulted in the unsympathetic scrutiny of Canada's jurisdictional assertions in the Arctic by the Americans.[31]

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[28] William R. Morrison, *Showing the Flag*. (Vancouver: University of British Columbia Press, 1985), p. 91.

[29] "The Hudson Bay Expedition," *Ottawa Evening Journal*, October 5, 1903.

[30] Canada, Department of the Interior, *Southern Baffin Island: An Account of Exploration, Investigation, and Settlement During the Past Fifty Years*. Compiled by A.E. Millward. (Ottawa: Printer to the King, 1930), pp. 14 - 15. Emphasis added.

[31] Morrison, op. cit., p. 91.

Although charged with initiating Canada's effort to effectively control the Arctic archipelago, the Neptune expedition was largely a scientific endeavour. During the cruise of the *Neptune*, a number of ambitious projects were undertaken.[32] Despite these competing interests, Superintendent Moodie and his reinforcements succeeded in the task of notifying the eastern Arctic of the impending assertion of jurisdictional authority by Canada.

The accomplishments of the NWMP were many. In addition to at least two formal flag raising ceremonies declaring Canada's jurisdiction over the archipelago,[33] Superintendent Moodie used his discretionary powers to institute an immediate export ban on musk ox pelts in order to protect the primary food source of the Inuit,[34] and he also submitted a comprehensive report regarding the difficulties and dangers associated with the supervision of Hudson Bay that formed the basis for later action by Ottawa.[35] Furthermore, aboard the *Neptune* during the 1904 northern patrol, Moodie contacted whalers at Pond Inlet, and saw to the posting of notices at all whaling stations on Baffin Island, while, from the post established at Fullerton Harbour, Moodie's subordinates announced Canada's intentions to the Scottish and American whalers operating in Hudson Bay. The following proclamation was distributed to the whalers:

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[32] For instance, the most impressive study was the comprehensive geological account of the territory bordered by Port Burwell, Cape Herschel and Fullerton Harbour, 1200 miles per side. Also, the first study concerned with Inuit health and the impact of whalers was conducted by Dr. L.E. Borden. For a comprehensive account of the Neptune expedition and its accomplishments, consult: A. P. Low, *The Cruise of the Neptune 1903-1904: Report on the Dominion Government Expedition to Hudson Bay and the Arctic Islands on Board the D.G.S. Neptune.* (Ottawa: Government Printing Bureau, 1906); Canada, Royal Northwest Mounted Police, Report, 1904, IV; Ross, op. cit., pp. 87 - 103; Morrison, op. cit., pp. 87 - 96; Zaslow, op. cit., pp. 262 - 264.

[33] These ceremonies were conducted at Cape Herschel, Ellesmere Island and Port Leopold, Somerset Island. Low, op cit., p. 48, 56 respectively. W. Gillies Ross states that at least three formal declarations of possession were made, but he does not give evidence to support the claim. Ross, op. cit., p. 91.

[34] Canada, Royal Northwest Mounted Police, Report, 1904, IV, p. 12.

[35] Ibid., pp. 5-7.

> *To Agents in charge of Whaling and Trading Stations, Masters of Whalers, etc., and all whom it may concern:*
>
> A detachment of the Northwest Mounted Police has been sent into Hudson Bay for the purpose of maintaining law and order and enforcing the laws of Canada in the territories adjacent to the said Bay and to the north thereof. Headquarters have for the present been established at Fullerton. This has also been made a port of entry for vessels entering Hudson Bay and adjacent waters. All vessels will be required to report there and pay customs duties on dutiable goods before landing any portion of their cargo on any place in the said territories.
>
> Duty imported into Canadian territories lying to the north of Hudson Bay will be collected for the present by a Canadian cruiser which will visit those waters annually or more frequently. Any violation of the laws of Canada will be dealt with by an officer of the police accompanying such cruiser.[36]

By the time the *Neptune* ventured homeward, representatives of all whaling firms[37] operating in the waters of the eastern Arctic had been forewarned that their fishing and trading activities were to be governed by Canadian regulations.

In the western Arctic, concurrent with the cruise of the *Neptune*, a two-man team composed of Sergeant F.J. Fitzgerald and a constable left Fort McPherson[38] destined for Herschel Island. In many respects the Herschel expedition was a pale comparison to its counterpart. Its sole intention was to bring some modicum of order to the small, isolated and desolate island that was favoured by American whalers as a wintering ground. Politically, however, the expedition was every bit as important as the ambitious *Neptune* patrol, as a memorandum of the Department of the Interior attests:

> It is feared that if American citizens are permitted to land and pursue the industries of whaling, fishing and trading with the Indians without complying with the revenue laws of

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[36] One such document was found in an abandoned boiler at Whaler Point, Somerset Island. J. E. Bernier, *Report on the Dominion Government Expedition to Arctic Islands and Hudson Strait on board the C.G.S. "Arctic" 1906 - 07.* (Ottawa: C.H. Parmelee, 1909), p. 14.

[37] Ross, op. cit., pp. 96 - 97.

[38] Fort McPherson is located on the Peel River approximately 15 miles south of the junction with the Mackenzie River.

> Canada and without any assertion of sovereignty on the part of Canada, unfounded and troublesome claims may hereafter be set up.[39]

Although the official position of the government was that Canada's title to the territory was not in doubt, it was nevertheless deemed necessary to show the flag as a preventive measure. Undoubtedly, the proximity of Herschel Island to Alaska contributed to Ottawa's discomfort and justified immeditate action.

The primary tasks of Sergeant Fitzgerald and his subordinate were to emphasize Canada's jurisdiction, collect customs duties for imported trade goods, and stop the flow of alcohol to the natives. It was a formidable undertaking that was made more unwieldy by the loss of most of the expedition's supplies during transport. The expedition was faced with an anomalous situation: "How could the police carry out their mission, establish government authority, and enforce laws in the area when they owed their lodging to one of the 'power groups' on the island and their warmth and some of their food to another."[40]

Given its operational predicament, the Herschel expedition managed its task as well as could be expected. The police did what they could to impede the flow of alcohol and control the unruly conduct of the whalers.[41] As well, cargo manifests were inspected, though this was done on a good will basis since the search of vessels was virtually impossible with the limited manpower and resources. Fitzgerald had sometimes to feign ignorance in order not to reveal the weakness of his position.[42] Nevertheless, relations with the whaling captains were generally congenial. Fitzgerald's orders were largely observed not only because his assertion of Canada's jurisdiction had little practical effect on the whaling and trading operations of the whalers, but also because the police provided a line of defense against the notoriously unruly and undisciplined crews of these ships.[43]

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[39] J.A. Smart, memorandum, n.d. Comptroller Correspondence Series, 1874 - 1919, v. 293, as cited in Morrison, op. cit., p. 78.

[40] Ibid., p. 82.

[41] The report of Sergeant Fitzgerald differs significantly from those of missionaries, one of which was cited above, regarding the debauchery of Inuit women. According to Morrison, the discrepancy in the accounts is explained by the police distinguishing between different kinds of debauchery. As was the case in the Yukon, sexual exploitation was not resented by the police and thus was not condemned. Physical deterioration, on the other hand, was obviously detrimental to the Inuit and resulted in a direct response. Ibid., p. 84.

[42] Canada, Royal Northwest Mounted Police, Report, 1905, I, L, p. 129.

In sum, the Herschel expedition achieved a qualified success. While it would be an overstatement to suggest that the police "asserted" jurisdictional control over the area, it may be said that a Canadian presence had been established on Herschel Island with which the American whalers had to contend. At the very least, the Herschel expedition laid the ground work for the continued supervision of the island and surrounding territory by the NWMP.

Aside from its two Arctic expeditions, the Dominion government consulted W.F. King, Canada's Chief Astronomer, for his assessment of the legal status of the Arctic archipelago. King's report,[44] primarily concerned with the 1880 annexation, calls attention to the uncertainty regarding Canada's territorial limits in the far north, and further contends that doubts as to the legal validity of the transfer were not overcome until 1895. With suspicions that Canada's assumption of authority may not have full international force, King cautiously concludes: "...Canada's title to some at least of the northern islands is imperfect. It may possibly be best perfected by exercise of jurisdiction where any settlements exist."[45]

King's supplemental memorandum,[46] a more comprehensive legal interpretation of the archipelago's status that is augmented by a detailed historical record of territorial claims made in the region,[47] is more resolute in its conclusions. Though admitting that American claims by discovery to Grinnell Land, central Ellesmere Island, may be superior to those of the British,[48] King asserts: "...it is a reasonable contention that the whole of the northern islands west of Davis strait, Baffin bay, Smith sound, etc., is British by right of discovery."[49] With little evidence of occupation north of Lancaster Sound, the report maintains that Britain's titles by right of discovery remain inchoate, or imperfect, but King qualifies this observation with the finding that "...at least no opposing occupation, of a character recognized by international law as effectual, has taken place."[50] In order that Britain's inchoate titles not be superceded by foreign claims based on occupation, the Dominion government was advised to assert unequivocally its jurisdiction in those regions where foreign occupied stations exist.[51]

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[43] Morrison, op. cit., p. 83.

[44] King, op. cit., p. 3-8. Memorandum of January 23, 1904.

[45] Ibid., p. 8.

[46] Ibid., p. 23-26. Memorandum of May 7, 1904.

[47] King divides the archipelago into seven districts, one of which concerns Northern Greenland, and examines each for acts of discovery, acts of possession and evidence of occupation. Ibid., pp. 26 - 34.

King, however, does not limit the scope of his report to land claims alone, but argues that the waters of the archipelago are territorial--also falling under Canada's jurisdiction. While citing the stipulation in international law that straits which lead from one part of the high seas to another are open to all nations for innocent navigation, King claims that this does not apply to Canada's northern waters. Since navigation through the Arctic archipelago would almost certainly require a winter spent in the ice, King maintains that this would attach the ship to the land as if in harbour, requiring authorization from Canada.[52]

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[48] Aside from American exploratory activity on central Ellesmere Island, King holds that the majority of American discovery in the Arctic came in the footsteps of their British counterparts, and further asserts that the majority of American claims in the region were made by noncommissioned officers which rendered these claims legally inconsequential. Citing the legal scholars Taylor and Hall, King writes: "The significance of formal taking of possessions is said by writers on international law to be nothing in the case of an uncommissioned navigator, who takes formal possession, and then sails away without effecting permanent occupation. On the part of a commissioned navigator, his act is assumed to be a state act, equivalent to the expression by the state of an intention to occupy." Ibid., p. 24. It appears Otto Sverdrup falls into this same classification. Although listed as an explorer in King's "Group 5" study, Sverdrup is not accredited with discovering or taking possession of Axel Heiberg and the Ringnes Islands.

[49] Ibid., p. 24. This description largely corresponds with the northern territorial limits proclaimed by Canada in 1895. It is not known, however, what King intends with the "etc.," especially in light of the American claim to Grinnell Land, but the author pointedly describes Nares' claim to northern Ellesmere Island on behalf of the British.

[50] Ibid., p. 26.

[51] Ibid., p. 24. King draws attention to American occupations in the archipelago, despite noting that they are private in nature and unauthorized by their government.

Hudson Bay and Hudson Strait, though included in this legal regimen, are dealt with separately in the report. King contends that the territoriality of these waters was originally asserted by Britain in 1670, with the issuance of the Hudson's Bay Co. Charter by Charles II, and never relinquished.[53] Furthermore, King adds that the United States recognized Britain's title to Hudson Bay and Hudson Strait in the 1816 Treaty.[54] Thus, Canada's jurisdiction, according to King's report, encompasses virtually the whole of the Arctic archipelago--both land and water.

Barely had the Neptune returned from its cruise of the eastern Arctic when Canada's next expedition was slated for departure. Though initially intended for a three-year voyage to attain the North Pole, the *Arctic*, commanded by Captain J. E. Bernier, was rerouted by the Department of Marine and Fisheries to patrol Hudson Bay. The expedition was announced by Prime Minister Laurier in a statement before the House of Commons on July 29, 1904:

> The 'Neptune' is to come back and be relieved and be replaced by another boat, the 'Arctic,' which will be under the command of Captain Bernier, and which is to sail on August 15. This boat will carry an officer and ten men of the mounted police, apart from the crew of the ship....Their instructions are to patrol the waters, to find suitable location for posts, to establish those posts and to assert the jurisdiction of Canada. The government has been induced to come to this action because it is evident that the time has come when our interests in these northern waters should not longer be neglected. At the present time there are whalers and fishermen of different nations cruising in those waters,

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[52] Ibid., p. 25.

[53] Although acknowledging that part of Hudson Bay was turned over to the French with the Treaty of Ryswick, King contends that the division of the territory was never carried out, and that the entire waterway reverted back to Britain with the Treaty of Utrecht. Ibid., p. 25.

[54] Ibid., p. 26.

> and unless we take active steps to assert, what is the undoubted fact, that these lands belong to Canada, we may perhaps find ourselves later on in the face of serious complications.[55]

To continue with Canada's assertion of jurisdictional control, Superintendent Moodie was again ordered to Hudson Bay to command the N.W.M.P. patrol.[56]

Despite King's favourable assessment of the legal status of the archipelago and the government's apparent resolve to bring the region under the effective control of Canada, Ottawa had yet to decide what was to be done with Hudson Bay and Hudson Strait. Moodie's objectives listed in the instructions of Comptroller White, the head of the Mounted Police, included: the boarding of vessels that may be encountered, the establishment of police posts and "the introduction of the system of Government control as prevails in the organized portion of Canada...."[57] White, however, did not elaborate as to what was intended by "the introduction of the system of Government control."[58]

The Department of Marine and Fisheries, the institution responsible for the patrol of Hudson Bay by the *Arctic*, were equally ambiguous, if not contradictory, with their instructions. The government had yet to decide whether the provisions of the Convention of 1818 were to be applied to Hudson Bay.[59] As a result, Moodie was told by the Fisheries department to use his own judgement with regard to action taken against foreign fishing vessels in Hudson Bay, but also cautioned that "...it is not the wish of the

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[55] Canada, House of Commons, Debates, 1904, p. 7969.

[56] As opposed to the Neptune expedition, the 1904 cruise of the *Arctic* was purely a police venture.

[57] White, memorandum, 1 August 1904. Comptroller Correspondence Series, 1874-1919, v. 293. As cited in Morrison, op. cit., p. 97.

[58] Morrison, op. cit., p. 97.

[59] " The Convention of 1818 had barred Americans from the 'inshore fisheries' of British North America. This prohibition had been withdrawn by the Reciprocity Treaty of 1854 and again by the Treaty of Washington in 1871. The United States terminated the fisheries clause of this latter treaty in 1885, so in 1904 it was open to the Canadian government to ban Americans from fishing in Hudson Bay, which it considered to be its territorial waters." Morrison, op. cit., # 53, p. 197.

Government that hurried or harsh measures with reference to the laws should be made."[60] Essentially, Moodie was instructed to improvise, but was given no assurance by the government that his actions would be supported in case of a dispute.[61] As it turned out, the most substantive accomplishment of the expedition appears to have been the erection of a permanent barrack for the police force at Fullerton Harbour and a patrol through Chesterfield Inlet to Baker Lake.

It was not until 1906 that the Dominion government determined its position regarding Hudson Bay. Within an amendment to the Fisheries Act that imposed a $50 licensing fee on all whaling ships operating in Hudson Bay, Canada couched the declaration that Hudson Bay was wholly territorial water:

> ...the license fee payable for any vessel or boat engaged in the whale fishery or hunting whales within the waters of Hudson Bay, or the territorial waters of Canada north or the 55th parallel or north latitude, if not so engaged or hunting in connection with a factory established in Canada, shall be fifty dollars for each year; and, *inasmuch as Hudson Bay is wholly territorial water of Canada*, the requirements of this section as to licensing, and as to the fee payable therefor, shall apply to every vessel or boat engaged in the whale fishery or hunting whales in any part of the waters of Hudson Bay, whether such vessel or boat belongs to Canada, or is registered or is outfitted in, or commences her voyage from, any other British or foreign country.[62]

The legislation caused concern in London. British officials feared an unfavourable American reaction to the restrictions placed on the previously unregulated Hudson Bay whaling industry. Despite the concern, the legislation was not disallowed.

The U.S. Government did not register a protest against the enactment, and Capt. Bernier, dispatched in 1906 on the first of his three successive Arctic patrols as Officer in Charge and Fisheries Agent, encountered no difficulty with collection of licensing fees.

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[60] F. Gourdeau to Moodie, 18 September 1904, Comptroller Correspondence Series...v. 293. As cited in Morrison, op. cit., p. 97.

[61] Morrison, op. cit., p. 97.

[62] Canada, Statutes, 6 Edward VII (1906), Chap. 13, Sec. 14. Emphasis added.

According to the official record of the 1906-07 expedition, ten licenses were issued to five Scottish whalers.[63] Three other whalers known to be operating within the archipelago's waters, two Scottish[64] and an American,[65] were not issued licenses since they were not in the neighbourhood of the patrol.

Aside from the regulation of the whaling fishery, the primary undertaking of the *Arctic*, according to Ottawa's instruction, was the "annexation" of all lands that the patrol may have opportunity to call upon.[66] By ship in summer and sledge in winter, Bernier and his crew took possession of most of the archipelago's islands by formal ceremony. The proclamation, which read, in part, as follows,

> ...This island..., and all islands adjacent to it, was graciously given to the Dominion of Canada by the Imperial Government, in the year 1880, and being ordered to take possession of the same, in the name of the Dominion of Canada, know all men that on this day the Canadian Government Steamer *Arctic* landed on this (point or island), and planted the Canadian flag and took possession of......island and all islands adjacent to it in the name of the Dominion of Canada....[67]

was signed by Bernier and his entourage, it was placed in a metal container and encased in a rock cairn, and, with Canada's flag perched atop, was photographed.[68] In this fashion, the 1906-07 patrol of the *Arctic* took possession of the following islands: Bylot, Cornwallis, Byam Martin, Melville, Eglinton, Bathurst, Prince Patrick, Lowther, Young, Davy, Garrett, Griffiths, Russel, Baffin, Beloeil,[69] North Kent, Axel Heiberg, Ammund

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[63] Bernier, op. cit., p. 72.

[64] Ibid.

[65] Ibid, p. 75.

[66] Dorion-Robitaille, op. cit., p. 69. Dorion-Robitaille apparently quotes the official instruction given to Moodie, but she does not provide a reference to the document.

[67] Ibid., p. 81.

[68] Ibid., p. 79.

[69] This is according to the Declarations left by Bernier at Albert Harbour, Pond's Inlet on November 9, 1906. Bernier, op. cit., pp. 30-31.

Ringnes, Ellee Ringnes, King Christian, Cornwall, Graham, Buckingham, Table, and all adjacent islands.[70]

Over a little more than three years, Canada had made significant inroads towards the establishment and exercise of jurisdiction over the Arctic archipelago. Two police posts had been established at key locales, the collection of custom duties was underway, the whaling industry was coming increasingly under Canadian control and much of the archipelago was coming under supervision afforded by Canada's annual Arctic patrols.

For Senator Pascal Poirier, however, Ottawa's actions had yet to quell the fear of American encirclement. Sensitive to Canada's past losses in territorial disputes with the United States and moved by recent American newspaper reports that heralded American exploratory and scientific endeavours in the Arctic archipelago, Poirier introduced the following motion in the Senate on February 20, 1907: "That it be resolved that the Senate is of opinion that the time has come for Canada to make a formal declaration of possession of the lands and islands situated in the north of the Dominion, and extending to the north pole."[71] Poirier provided a lengthy historical defense of the proposition, asserting that the British Crown was the unquestionable possessor of the lands and islands of the archipelago by right of discovery and actual possession. The Senator, however, is renowned for his advocacy of the Sector theory. Before the Senate, Poirier explained,

> ...when our Capt. Bernier was in New York, a guest of the Arctic club, the question being mooted as to the ownership of the Arctic lands, it was proposed and agreed--and this is not a novel affair--that in future partition, of northern lands, a country whose possession to-day goes up to the Arctic regions, will have a right, or should have a right, or has a right to all the lands that are to be found in the waters between a line extending from its eastern extremity north,

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[70] This is according to the proclamation left by the Arctic patrol at James Sound, Ellesmere Island on August 12, 1907. Bernier, op. cit., p. 50. This act amounted to symbolic appropriation and did nothing to perfect Britain's inchoate title.

[71] Canada, Senate, Debates, 1906-07, p. 266.

> and another line extending from the western extremity north. All the lands between the two lines up to the north pole should belong and do belong to the country whose territory abuts up there.[72]

Poirier continued to describe the respective sectors for Norway and Sweden, Russia, the United States and Canada.[73] Beginning "...at the latitude of say between 70 and 80 degrees parallel..." Canada's sector was to include all the land between 141° w. and 60° w., extending all the way to the pole.[74]

The controversial nature of Poirier's proposition did not concern the use of meridians of longitude to denote Canada's eastern and western boundaries in the Arctic. Originally, in the address to Britain in 1878, Canada had used 141° w. to mark the prospective western delimitation of the archipelago. Furthermore, the 1897 amendment to Canada's 1895 boundary enactment utilized 141° w. and 60° w. to demarcate the western and eastern boundaries in the Arctic respectively.[75] The point of contention centered on the extension of these boundary delineations to the pole, and the claim of the territory lying within.

It was this point--claiming possession of all territory to the North Pole--to which Sir Richard Cartwright, the government's representative in the Senate, directed his rebuttal:

> ...there is no doubt, I think, that Canada has a very reasonably good ground to regard Hudson bay as a mare clausum and as belonging to it, that everything there may be considered as pertaining thereto. Touching the other point my hon. friend has raised, whether we, or whether any other nation is entitled to extend its territory to the north pole, I would like to reserve my opinion. I am not aware that there

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[72] Ibid., p. 271.

[73] The region extending from 60° W to 5° E. is not included in any sector. Although Greenland was assumed to be under Danish control, it was not until 1919 that Denmark requested that the Allies recognize Danish sovereignty over Greenland. Britain did so in 1920. Johnston, op. cit., pp. 36-37.

[74] Canada, Senate, Debates, 1906-07, p. 271.

[75] Although the territorial description contained in the Order in Council does not specify 60° W. as constituting the eastern boundary, the map attached to the Order and incorporated by reference in the description uses the meridian as the basis point. Donat Pharand, *Canada's Arctic waters in international law.* (Cambridge: Cambridge University Press, 1988), p. 5.

> have been any original discoverers as yet who can assert a claim to the north pole, and I do not know that it would be of any great practical advantage to us, or to any other country, to assert jurisdiction quite as far north as that.[76]

Cartwright assured the Senate that the Dominion government would do all it could to prevent Arctic territory from falling to foreign hands, and successfully moved that debate on the motion be adjourned.

Although Senator Poirier's motion died on the floor of the Senate, the notion of delimiting Canada's territorial limits in the Arctic by means of the sector theory was resurrected by Capt. Bernier on the shore of Melville Island. In celebration of Dominion Day, 1909, during the second of Bernier's Arctic patrols, a plaque was ceremonially unveiled that proclaimed Canada's jurisdiction over the entire archipelago to the northern reaches of the pole. According to Bernier,

> Dominion Day was celebrated by all on board; all our flags were flying, and the day itself was all that could be desired. At dinner we drank a toast to the Dominion and the Premier of Canada; then all assembled around Parry's rock to witness the unveiling of a tablet placed on the rock, commemorating the annexing of the whole of the Arctic archipelago. I briefly referred to the important event in connection with the granting to Canada, by the Imperial Government, on September 1, 1880, all the British territory in the northern waters of the continent of America and Arctic ocean, from 60 degrees west longitude to 141 degrees west longitude, and as far north as 90 degrees north latitude. That we had annexed a number of islands one by one and a large area of territory within the degrees 141 and 60 west longitude as Canadian territory, and now under Canadian jurisdiction. Three cheers were given in honour of the Premier and Minister of Marine and Fisheries of Canada, and the men dispersed for the balance of the day to enjoy themselves.[77]

Bernier's proclamation was of no legal consequence since the extension of Canada's jurisdiction to the North Pole was not sanctioned by Ottawa. It was a personal act, perhaps motivated by the Captain's long sought-after goal of discovering the pole and claiming it on Canada's behalf,[78] that was true to the character of Bernier. The energetic and determined champion of "Canadian sovereignty in the Arctic" repeatedly went to great lengths to secure for Canada jurisdictional control of the archipelago. Ordered to patrol the region of Banks Island during the 1908-09 expedition, Bernier had the *Arctic* retrace much of its previous journey while issuing five whaling licenses[79] and informing the natives encountered along the way that they were Canadian citizens.

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[76] Canada, Senate, Debates, 1906-07, p. 274.

[77] J. E. Bernier, *Report on the Dominion of Canada Government Expedition to the Arctic Islands and Hudson Strait on board the D.G.S. "Arctic"*, 1908-09. (Ottawa: Government Printing Bureau, 1910), p. 192.

The patrol of 1910-11, however, did not attain the same measure of success as the previous journeys due to exceptionally heavy ice conditions and bad weather. The expedition was unable to sail through the Northwest Passage to Vancouver as instructed, but it did manage to map the largely unknown region of Brodeur Peninsula, along Hecla and Fury Strait,[80] during the harsh winter spent at Arctic Bay, northern Baffin Island. Under sail again in July 1911, Bernier was once more frustrated by ice in Prince Regent Inlet. This forced the *Arctic* to retreat homeward by way of Baffin Bay and Davis Strait. Having called at Kekerten and Blacklead Island, the expedition sailed into Quebec on September 25, 1911. The return of the patrol marked the end of an era. After six years of invaluable service--taking possession of the lands of the archipelago at which it landed, patrolling the waters of the archipelago, supervising the whaling industry and issuing licenses to all whalers encountered, and informing all the Inuit and foreign nationals of Canada's jurisdiction over the lands and waters of the archipelago--the annual Arctic patrol was discontinued.

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[78] J. E. Bernier, *Master Mariner and Arctic Explorer*. (Ottawa: Le Droit, 1939), p. 305; Dorion-Robitaille, op. cit., pp. 20-32.

[79] One of the licenses was issued to Harry Whitney of New York who had engaged in a hunting expedition on Ellesmere Island. Since the schooner Whitney had chartered had on board a whaling boat, he was forced to take out a fishery license. Bernier, "Report on the 1908-09 Expedition," op. cit., p. 273. The other four were issued to the fishery agent at Kekerton station. Ibid., p. 281.

[80] Bernier, *Master Mariner*... op. cit., pp. 357-359.

Regarding the situation in Hudson Bay and the eastern Arctic as reasonably stable, the newly elected Conservative government of Sir Robert Borden shifted its focus to the western Arctic. Although Herschel Island continued to be supervised by the police, the detachment was not capable of overseeing all of the whaling, trading and prospecting ventures that were operating in the region. Furthermore, the activities of the 1908-12 Stefansson-Anderson Expedition,[81] under the auspices of the National Geographic Society and the American Museum of Natural History, was particularly worrisome for Ottawa. The probability of new land being discovered in the ice-laden regions of the Beaufort Sea, or in the uncharted regions of Banks, Victoria, and Melville islands, was reasonably strong, and Dominion officials did not want to confront another Sverdrup situation. "The spectre of foreign institutions, carrying a foreign flag, making discoveries in areas which Canada considered her own was hard to swallow."[82]

In February 1913, an opportunity arose which the government did not allow to slip past. Ottawa was approached by Vilhjalmur Stefansson for financial assistance to supplement funding already obtained from the National Geographic Society and the American Museum of Natural History for the second Stefansson-Anderson expedition. The ethnological study of various Eskimo peoples was to be continued, but the expedition was primarily geared to the discovery of new lands in the west of the archipelago. Since a joint venture would lead to questions as to the ownership of lands that might be discovered, the cabinet subcommittee that interviewed Stefansson recommended,

> ...that if it could be arranged we thought it advisable for the Dominion to pay the whole cost of the proposed expedition, on condition that Mr. Stefansson would become a naturalized British subject[83] before leaving and that the

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[81] The expedition was primarily concerned with the ethnological study of Inuit that had yet to be fundamentally altered by contact with the white man.

[82] Richard J. Diubaldo, *Stefansson and the Canadian Arctic.* (Montreal: McGill-Queen's University Press, 1978), p. 64.

[83] Stefansson was born at Arnes, Manitoba, but reared in the United States.

> expedition would fly the British flag. In this way we would get the entire benefit of the expedition and Canada would have any land that might be discovered....The subcommittee...feels strongly that the Dominion Government should have a hand in this expedition and if possible control and pay for it.[84]

Strongly supported by R. W. Brock, the director of the Geological Survey who wished to continue with the ethnological and anthropological work of Stefansson and Anderson while mapping and studying the geological composition of the territory north of Great Bear Lake, the government accepted the proposal and agreed to finance the entire expedition. With the two American institutions graciously relinquishing their claim to the endeavour, the Canadian Arctic Expedition of 1913-18 was born.

Despite the disaster of the *Karluk*[85] and the conflict that arose over the allocation of the remaining supplies, the expedition managed to complete the tasks set for it. While the southern party of the expedition carried out the various assignments ordered by the Geological Survey,[86] a small group led by Stefansson conducted intermittent hydrographic soundings through the Arctic ice in the search for new land. Traveling by sledge over the Arctic ice--often stranded for days on ice floes--and living primarily from the land, the Stefansson team traversed considerable stretches of the Beaufort Sea, the Arctic Ocean and much of the western archipelago. They were rewarded for their efforts with the discovery of Brock, Borden, Meighen, and Lougheed Island between 1915-16.[87] Canada had discovered and claimed the last of the major lands lying within the Arctic archipelago.[88]

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[84] PAC, RG42, 84-2-55, 7 February 1913. As cited in Diubaldo, op. cit., p. 64.

[85] The *Karluk* was the supply ship of Stefansson's northern expedition. It was caught in ice near Point Barrow, carried helplessly over 1000 miles, and sank near Herald Island off the Siberian coast. Only 12 of the 28 people aboard survived. Stefansson was off hunting when the ship was carried off in the ice and managed to return to the southern party which was at Collinson Point, in the vicinity of Herschel Island.

[86] The results of these studies can be found in *Report of the Canadian Arctic Expedition 1913-18*, 16 vols. (Ottawa: Printer to the King, 1919-1946).

Although the nation was justifiably proud as Stefansson and his comrades had gone where no man had gone before, the expedition's success did not result in a flourish of Canadian activity in the region. Preoccupied with the war effort in Europe, the Dominion could, for the time being, ill-afford greater involvement in the Arctic.

Although Ottawa could provide little in the way of funding and resources for the exercise of jurisdictional control in the Arctic during the war years, Canada did not abandon its administrative responsibilities. In 1917, Parliament ordered that the musk ox become a protected species under Canadian law. Although more than a decade after Inspector Moodie had originally drawn attention to the matter, Ottawa amended the Northwest Game Act[89] to restrict all hunting of the near-extinct musk ox, save for the resident Inuit peoples who depended upon it for their survival, and for specific scientific purposes. Unknown to Canada, the musk ox was soon to become the object of an international controversy that pitted Canada against Denmark.

In 1919, the Inuit of northwest Greenland were found to be hunting musk ox on central Ellesmere Island. The amended Northwest Game Act was not intended to afford protection for Inuit bands in general, only for those living within Canada's jurisdiction. Canada, however, could not control the hunting of the musk ox by the Thule Inuit because the effective exercise of Canada's jurisdiction had yet to reach the region. Through the British Foreign Office, Canada requested that the Danish government restrain the actions of the Thule Eskimo. The response Ottawa received was unexpected. The April 20, 1920 reply from the Danish government read in part as follows:

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[87] Vilhjalmur Stefansson, *Discovery, The Autobiography of Vilhjalmur Stefansson*. (New York: McGraw-Hill Book Company, 1964), pp. 193-203.

[88] The only islands that remained undiscovered were in Foxe Basin. A number of them were discovered by T. H. Manning during his 1937 and 1941 expeditions. The remainder were found in 1948 by aerial reconnaissance flights. Robitaille, op. cit., p. 9.

[89] Canada, Statutes, George V (1917), c. 36, s. 1.

> The Government therefore submitted the matter to the Director of the above mentioned Thule Station, Mr Knud Rasmussen, who thereupon handed to the Administration of the Colonies of Greenland a statement on the subject, in which he comes to the conclusion that he will not need the assistance of the Canadian Government in order to carry out the protective measures indicated in his statement. Having acquainted themselves with the statement in question, my Government think that they can subscribe to what Mr. Rasmussen says therein, and have instructed me to submit a copy of it to His Britannic Majesty's Government.[90]

The punch comes in Rasmussen's accompanying address regarding the status of the northern islands:

> It is well known that the territory of the Polar Exquimaux falls within the region designated as "No Man's Land" and there is, therefore, no authority in the district except that which I exercise through my station [in Greenland]....I venture to close with the observation that, in order to carry out the protective measures indicated in this statement, I shall need no assistance whatever from the Canadian Government.[91]

The severity of the statement by the Danish government that Ellesmere Island was unoccupied territory was compounded by a confidential memorandum prepared for the Canadian Department of the Interior that largely upheld the Danish position.

> The situation as to sovereignty in the northern islands, therefore, appears to be that Britain has had an inchoate title which now probably through the lapse of time may be considered to have terminated; that the Low and Bernier expeditions may have established a "fictitious" title which also has probably lapsed; and therefore, that apparently Denmark or any other country is in a position to acquire sovereignty by establishing effective occupation and administration.[92]

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[90] Report of Advisory Technical Board, 1920. As cited in Johnston, op. cit., p. 37.

[91] Ibid.

[92] Memorandum, n.a., n.d., Harkin Papers, v. 1. As cited in Morrison, op. cit., p. 164.

Nevertheless, the Dominion government strongly protested the Danish position, insisting that Ellesmere Island was subject to British sovereignty.[93] The matter was eventually resolved by diplomatic efforts of the British Foreign Office,[94] but the dispute sparked Canada's resolve finally to take effective control of the archipelago's northern islands.

With Britain's title to the northern islands appearing rather tenuous, the Dominion government again looked to the police to undertake the daunting task of exercising Canada's administrative control in the farthest reaches of the north. The RCMP--the successor to the NWMP--were to establish effectively Canada's jurisdictional authority over the northern islands, territory so far north that Inuit populations could not even sustain themselves, while also reasserting Canada's control in the remainder of the archipelago.

In 1920, after establishing a post at Port Burwell, the strategic point at the head of Hudson Strait, the RCMP had to wait almost two years before returning to the Arctic. The implementation of policy was delayed by a hesitant and indecisive government that was hampered by inter-departmental politics. It was only with the recommission of J.E. Bernier and the aging *Arctic* that police posts were established at Craig Harbour, southeastern Ellesmere Island, and at Pond Inlet,[95] northeastern Baffin Island, in 1922. Additional detachments of the RCMP were founded at Pangnirtung, Cumberland Gulf, in 1923, and at Dundas Harbour, southeast Devon Island in 1924. Supplies were also landed at Cape Sabine, the southern end of Kane Basin, in 1924 in order that central Ellesmere Island would come under the purview of the police with regular patrols from Craig Harbour. Canada's efforts to reinforce its Arctic jurisdiction progressed well until 1925 when the

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[93] Johnston, op. cit., p. 38.

[94] Denmark's claim of sovereignty over Greenland was recognized by Great Britain at about the same time, which may explain why Denmark did not pursue the matter further. Pharand, op. cit., p.47. For the Fifth Thule Expedition, Knud Rasmussen sought the permission of the Dominion government to cross the archipelago from Baffin Island to Alaska. Morris Zaslow, "Administering The Islands," in *A Century of Canada's Arctic Islands*, ed. Morris Zaslow (n.p.: The Royal Society of Canada, n.d.), p. 66.

[95] The primary reason for the establishment of the Pond Inlet detachment was to investigate the murder of Newfoundlander Robert Janes by a local Inuit. Morrison, op. cit., pp. 167-68.

Dominion government was again faced with the possibility of a jurisdictional dispute in the high Arctic. This time, however, the threat came from the United States.

From American press reports, Ottawa learned of preparations that were under way for the American MacMillan-Byrd Expedition that was to conduct an aerial search for new land in the Arctic Ocean from its base at Etah, Greenland. Dominion officials were understandably worried at the prospect of the American flag being planted on new land within its Arctic jurisdiction, but further concern focused on the proposed stations that were to be established on Ellesmere and Axel Heiberg Island. As a result, the Northern Advisory Board, composed of senior representatives of all government departments with interests in the Arctic, was created to consider appropriate action.

W.W. Cory, Deputy Minister of the Department of the Interior, who was in Washington at the time, was ordered by the committee to discover the intentions of the expedition and firmly establish Canada's position. Although unable to discern the plans of the explorers, Cory informed Lieutenant Commander Richard E. Byrd that permission from Ottawa was to be obtained for the proposed flights to Ellesmere and Axel Heiberg Island.[96]

The Canadian Parliament, as a result of the proposed expedition, passed an amendment to the Northwest Territories Act[97] that required the licensing of all scientists and explorers entering the archipelago. Furthermore, a memorandum was despatched to the U.S. State Department, via the British ambassador, that outlined Canada's position with regard to sovereignty in the Arctic. The note that reached Secretary of State Frank B. Kellogg affirmed Canada's jurisdiction over the entire Arctic archipelago, special mention being made of Baffin, Ellesmere, and Axel Heiberg islands, placing emphasis on the sector theory interpretation of Canada's claims. Also, the correspondence called attention to the

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[96] D.H. Dinwoodie, "Arctic Controversy: the 1925 Byrd-MacMillan Expedition Example." *The Canadian Historical Review* , vol. LIII, no. 1 (March 1972), op. cit., p. 56.

[97] Canada, Statutes, George V (1925), c. 48, sec. 1.

RCMP posts in the eastern Arctic, and concluded by offering assistance and the issuance of the required permits to the expedition.[98]

Furthermore, the 1925 patrol of the eastern archipelago was given additional duties to stress the conventional approach of effective occupation and control recommended by the Departments of Justice and External Affairs. The voyage of the *Arctic* was ordered to establish an additional police post at Bache Peninsula, Ellesmere Island, and was also to survey the conditions of the resident Inuit.[99]

The U.S. government also gave consideration to the question of sovereignty, concerning itself with the standards for effective occupation in the far north in relation to the status of Ellesmere and Axel Heiberg islands. Lacking sufficient time to consider the matter seriously, however, the State Department decided the expedition should proceed without a formal comment from the government regarding Canada's claims in the Arctic, but also without formal authorization to annex new land.[100]

Fortunately for Canada, the MacMillan-Byrd expedition was wrought from the outset with serious difficulty and, after just three weeks, the project was abandoned and the expedition returned to the U.S.

Prior to their departure, the expedition was visited in Etah by the Arctic patrol of Capt. Bernier and Commander George P. Mackenzie, on their way to Bache Peninsula. Having verified the flights over Ellesmere Island, Mackenzie offered to issue the permits required by Canadian law, but was informed that permission was obtained from Ottawa en route.[101] The contention of Byrd proved later to be fictitious, and resulted in a mild protest being registered by Ottawa with the U.S. State Department. Based on Mackenzie's report and affidavits obtained from witnesses regarding Byrd's statements, the Dominion government drew attention to the failure of the expedition to secure permits required by Canadian law. The United States government did not respond to the protest, believing the letter was intended merely to place the Canadian position on record,[102] nor was it prepared to concede the question of sovereignty in the high Arctic. Although the subsequent MacMillan expeditions that operated in 1926 and 1927-28 in the Labrador-Baffin region--territory for which Canada's jurisdiction was not in doubt--were fully authorized and licensed by the Dominion government, the Americans continued with the search for land in the far north. Operating from Spitzbergen in 1926, Byrd again hunted for land in the Arctic Ocean between Ellesmere Island and the North Pole. The search proved unsuccessful and U.S. interest in the high Arctic consequently waned.

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[98] Dinwoodie, op. cit., pp. 57-58.

[99] Ibid., p. 59.

[100] Ibid., p. 59.

[101] Ibid., p. 62.

Within a span of just six years, Canada's jurisdiction in the northern Arctic had been seriously challenged. It was something Canada did not want to repeat. In 1926, an RCMP detachment was finally established at Bache Peninsula,[103] central Ellesmere Island, and Ottawa further restricted activities in the archipelago with the creation of the Arctic Islands Game Preserve.[104] Aside from the establishment of a police post at Lake Harbour, southern Baffin Island, 1927 also marked the beginning of wide ranging police patrols by dog-sled. In the southern regions of the archipelago, the duties of the these patrols included census taking, monitoring Inuit health, maintaining law and order, and some exploration. In the north, however, a region largely uninhabited, "...the political aspect of the police was paramount, for their main task was to establish a 'presence' in the interests of Canadian sovereignty...."[105] The first in a series of remarkable northern patrols crossed

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[102] Ibid., p. 63.

[103] The detachment was to be established in 1925, but heavy ice conditions prevented access to the region.

[104] Dominion Order in Council, P.C. No. 1146 (July 19, 1926.) Hunting was restricted to resident hunters and trappers.

[105] Morrison, op. cit., p. 162.

Ellesmere Island, and visited Axel Heiberg, Amund Ringnes, King Christian, Cornwall, and Graham islands before returning to Bache Peninsula. These patrols lasted well into the mid 1930's and succeeded in extending Canada's control to the northern reaches of the Arctic archipelago.

Thus, for three decades, Canada alone occupied the Arctic archipelago on Britain's behalf. Although the exercise of jurisdiction was sometimes sporadic, and largely concerned the territory south of Lancaster Sound, Ottawa, in 1919, initiated an Arctic policy that saw Canada's effective control encompass all of the Arctic islands. In the words of V.K. Johnston,

> Since 1922,...the Canadian government (on behalf of the Crown) has exercised jurisdiction in and over the Arctic islands by establishing police, customs, and post offices at strategic and necessry points and by conducting patrols over the surrounding territory....The title of Canada to the Arctic islands was recognized by Norway in 1930;[106] and the claims, of Denmark and of the United States have been nullified by Canadian occupation of the territory. No other nation has or could have any claim to the Canadian Arctic archipelago.[107]

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[106] Although Sverdrup's discovery of Axel Heiberg and the Ringnes islands was never officially endorsed by the Swedish or Norwegian governments, Canada purchased Sverdrup's papers that pertained to the expedition in order to tie up all loose ends. Zaslow, "Administering The Islands," op. cit., pp. 68-69.

[107] Johnston, op. cit., p. 40.

4. The Legal Issues Concerning Canada's Administration of the Arctic Archipelago.

Between 1880 and 1930, Canada's administration of Britain's territorial claims in the Arctic underwent dramatic change. For the first two decades, the Canadian government exhibited a reluctance to involve itself with the region. It remained true to the intentions enunciated in the 1882 Order in Council that only such action as was deemed necessary for the good government of the region would be forthcoming.[1]

It was not until the turn of the Twentieth Century, when Britain's hegemony was seen by Dominion officials as being threatened by foreign activity within the archipelago, that the Canadian government finally resolved to take the Arctic under its control. Beginning in 1903, Ottawa sought to extend Canada's jurisdictional control to the farthest limits of the archipelago with the effective occupation of the territory.

Although historian V. K. Johnston asserts that Canada was unequivocally in control of the entire archipelago by 1930,[2] it is the object of this chapter to discern whether Canada actually succeeded in securing the sovereign acquisition of the Arctic archipelago according to the dictates of international law. First, Canada's efforts to extend its authority to the ends of the archipelago will be examined in the light of an extensive review of the principle of effective occupation. This will be followed by an analysis of the sector theory and its impact on Canada's claim to the Arctic islands.

The Principle of Effective Occupation.

Since the mid 19th century, the principle of effective occupation has been the prime directive of international law with regard to the acquisition of sovereign title to unclaimed territory. In its basic form, the maxim stipulates that a state must take actual possession of a territory if sovereign title is to be secured.

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[1] Dominion Order in Council, P.C. No. 1839 (September 23, 1882). See Chapter 3, note 2.

[2] Johnston, op. cit., p. 40. See Chapter 3, note 108.

Discussed briefly above,[3] the principle of effective occupation was conceived in the mid 18th century to end the established practice whereby states fictitiously appropriated newly discovered lands, leaving only token symbols as proof of possession. As early as 1758, the "classicist" Vattel, in attacking the doctrines of "discovery" and "fictitious appropriation," charged that symbolic acts of possession were not sufficient to secure sovereign title to territory. Instead, advocating the notion of effective occupation, the jurist asserted that the only just means by which to appropriate title to an unclaimed land was for the state to take actual possession of the territory.

> All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession. When, therefore, a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it by another Nation. In this way navigators setting out upon voyages of discovery and bearing with them a commission from their sovereign, when coming across islands or other uninhabited lands, have taken possession of them in the name of their Nation; and this title has usually been respected, provided actual possession has followed shortly after.
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> But it is questioned whether a Nation can thus appropriate, by the mere act of taking possession, lands which it does not really occupy, and which are more extensive than it can inhabit or cultivate. It is not difficult to decide that such a claim would be absolutely contrary to the natural law, and would conflict with the designs of nature, which destines the earth for the needs of all mankind, and only confers upon individual Nations the right to appropriate territory so far as they can make use of it, and not merely to hold it against others who may wish to profit by it. Hence, the Law of Nations will only recognize the *ownership* and *sovereignty* of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them. In fact, when explorers have discovered uninhabited lands through which the explorers of other Nations have passed, leaving some sign of their having taken possession, they

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[3] See Chapter 2, pp. 38-40, 42-43.

> have no more trouble themselves over such empty forms than over the regulations of Popes,[4] who divided a large part of the world between the crowns of Castille and Portugal.[5]

It is apparent from Vattel's contentions that sovereign title--the right to exercise the functions of a state, to the exclusion of other states, over a portion of territory--is a right that must be earned, not erroneously acquired. Since sovereign title reserves a portion of the globe for the exclusive use of a state and its nationals, and limits access to the territory for other states and their subjects, the claimant state must prove itself worthy of sovereign status. It must earn this right by demonstrating the intention and the ability to act as the sovereign, effectively occupying the territory in question. For Vattel, the state's settlement of the territory[6] and the utilization of the land appear to constitute credible manifestations of effective occupation.

In many respects, the introduction of the notion of effective occupation was a return to the past. It was a revision of the classical understanding of the concept of sovereignty, predating the rise of international law, when sovereignty was a reflection of the political reality that "...boundaries of lands were necessarily determined by the fact that the power of a State was exercised within them."[7]

Although the notion advocated by Vattel lies at the root of the present doctrine, modern conceptions of the principle of effective occupation no longer view the state's settlement and utilization of the land as the primary indicators of actual occupation. In light of the fact that not all territories are conducive to habitation and exploitation in the conventional sense, international law has come to recognize the state's assertion of political control within a territory[8] as indicative of effective possession. According to Smedal,

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[4] The most famous Papal Bull was that issued by Alexander VI on May 4th, 1493, when the then known colonial world was divided between Spain and Portugal. Smedal, op. cit., pp. 13-14.

[5] E. De Vattel, op. cit., p. 84-85.

[6] Although using the phrase "...when it forms a settlement upon it," Vattels apppears to have intended the term "settlement" to be used in the general sense of the word. This seems a reasonable contention given Vattel's argument that a state cannot appropriate more land than it can inhabit or cultivate. See also: Lindley, op. cit., p. 140; W. Lakhtine, "Rights Over the Arctic." 24 *American Journal of International Law* (1930), p. 704. Lakhtine equates settlement with colonization.

[7] *Palmas Case*, op. cit., p. 839.

> By occupation a State aims at the reservation, to a greater or lesser extent, of an area for itself and its subjects. It wants in a corresponding degree to exclude others. It is, however, unreasonable that this should be permitted to a State, except in a territory where it really has established itself. International law has, therefore, laid down the rule that a State must take effective possession of a territory when it wants to occupy it, that is to say, it must bring the territory under its control and administration. It must be willing to maintain order, organisation, and administration of justice. Subjects of other States may enter the territory and require legal protection during their stay. As their own State is not allowed to exercise authority in the territory, it is reasonable to demand of the occupying State that it maintains an orderly state of things.[9]

The view of Lindley is similar: "There is now a general agreement that the essential point to look at is ...whether there has been established over [the territory] a sufficient governmental control to afford security to life and property there."[10] Furthermore, the emphasis placed on the role of the state in effecting the actual possession of territory is evident in the 1931 *Clipperton Island* award. In the decision that found France's title claim to Clipperton Island superior to that of Mexico, the arbitrator held,

> It is beyond doubt that by immemorial usage having the force of law, besides the *animus occupandi*, the actual, and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes

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[8] The principle of effective occupation demands that a state take actual control of the territory for which it lays claim, but this is not to be understood as meaning the state must be omnipresent. *Palmas Case* , op. cit., p. 840. It is sufficient that the state effectively occupy some places from which it can extend its authority throughout the region. F.A.F. von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law." 29 *American Journal of International Law,* (1935), pp. 463, 465-466.

[9] Smedal, op. cit., p. 32.

[10] Lindley, op. cit., p. 141.

> steps to exercise exclusive authority there. Strictly speaking, and in ordinary cases, that only takes place when the state establishes in the territory itself an organization capable of making its laws respected.[11]

The effective occupation of territory seems to be satisfied when the claimant state has established itself in the territory so as to be capable of exercising the requisite power and authority that is required for the maintenance of public order and the administration of justice. Thus, it appears that effective occupation of territory is manifested primarily through "...the establishment of adequate State machinery and the actual display of State jurisdiction."[12]

The Principle of Effective Occupation and its Application in Polar Regions.

While the manner of appropriation of territorial sovereignty is a matter of interpretation, so, too, is the measure of effectiveness that constitutes actual state control. No objective standard exists in international law[13] because the means necessary to occupy a territory effectively will vary from place to place, depending on the particular circumstances of a situation.[14] This fact is strikingly evident in the Arctic, according to the assertion of Hunter-Miller, where "effective occupation or settlement...can hardly be regarded as precisely synonymous with settlement elsewhere."[15]

While international law takes such factors as the size and the nature of a territory into account in the determination of the requisite level of effectiveness that constitutes actual possession,[16] the primary mitigating factor is the presence of human beings. As Huber asserts in the *Palmas* decision, "[a]lthough continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved...."[17] Thus, the measure of effectiveness required to secure title is roughly proportional to the density of a territory's population. The claimant state is required to exercise greater control in lands that are more heavily inhabited.[18] In the case of sparsely populated or uninhabited regions, the level of effectiveness demanded of a state's occupation will consequently be less. The answer to the question of what constitutes the minimum of state activity required to establish effective occupation, however, is not unanimously agreed upon.[19]

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[11] *Clipperton Island Case*, 28 January 1931, "Judicial Decisions Involving Questions of International Law" 26 *American Journal of International Law* (1932), pp. 393-394.

[12] Schwarzenberger and Brown, op. cit., p. 97.

[13] Head, op. cit., p. 213.

[14] According to Huber, "...in the exercise of territorial sovereignty there are necessarily gaps, intermittence in time and discontinuity in space...The fact that a State cannot prove display of sovereignty as regards such a portion of territory cannot forthwith be interpreted as showing that sovereignty is inexistent. *Each case must be appreciated in accordance with the particular circumstances." Palmas Case*, op. cit., p. 855. Emphasis added.

[15] Hunter-Miller, op. cit., p. 56.

The arbitrator of the *Clipperton Island Case*, for instance, awarded title of the island to France based on a single act of appropriation. From the deck of a French commercial vessel cruising off the island's shores, a commissioned naval officer of the French government, according to instructions from the French Minister of Marine, proclaimed French sovereignty over Clipperton Island on November 17, 1858. Careful geographical notes of the island were taken and a small party of the ship's crew visited the island, but no sign of French possession was left behind. The title claim was then registered with

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[16] Schwarzenberger and Brown, op. cit., p. 97.

[17] *Palmas Case*, op. cit., p. 840. See also: *Eastern Greenland Case*, op. cit., p. 46.

[18] Smedal, op. cit., p. 33.

[19] The Russian jurist, Lakhtine, is one of the few who oppose the application of "effective occupation" to the Arctic. Arguing that the conditions of the region prevent any serious occupation, Lakhtine dispenses with the principle and replaces it with the "doctrine of region of attraction." Based on the assumption that it is only the adjacent littoral states that have interests in the Arctic that are reasonable, the jurist contends that title to the islands of the Arctic should "...belong as a matter of fact to States in the region of attraction in which they are situated." The doctrine is very similar to the sector theory, a matter to be discussed later in the chapter. Lakhtine, op. cit., p. 710.

Hawaiian authorities and the French declaration of sovereignty was published in an Hawaiian journal.[20]

Even though the French government had not exercised any form of effective control on the island in the seventy years leading up to the Arbitration, and despite Mexican counter-claims, the arbiter found the French claim sufficient for sovereign title. The reason for the decision is as follows:

> There may...be cases where it is unnecessary to have recourse to [the] method [of effective occupation]. Thus, if territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.
>
> It follows from these premises that Clipperton Island was legitimately acquired by France on Nov. 17, 1858. There is no reason to suppose that France has subsequently lost her right by *derelictio*, since she never had the *animus* of abandoning the island, and the fact that she has not exercised her authority here in a positive manner does not imply forfeiture of an acquisition already definitely perfected.[21]

Although international law has long held that acts of "symbolic appropriation" are capable of acquiring only an inchoate title, in the case of lands that are almost entirely uninhabited, it would appear that the doctrine may, in fact, secure sovereign title.

While the arbitral decision seems to be in direct conflict with the contemporary demand for effective occupation, von der Heydte finds the decision appropriate for the circumstances. The jurist asserts that the demand for the effective occupation of completely uninhabited territory constitutes a "misconstruction" of the doctrine since the exercise of sovereign's rights and duties is contingent upon the presence of human beings.

> Effectiveness...means the guarantee of a minimum of protection to one's own subjects as well as to foreigners coming to the region. Effectiveness then seems to be best

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[20] *Clipperton Island Case* , op. cit., p. 391.

[21] Ibid., p. 394.

> illustrated by the actual display of sovereign rights, the maintenance of order and protection. But as a matter of fact sovereign rights can be exercised only over human beings, in inhabited lands; a certain order can be maintained only amongst human beings, i.e., again in inhabited countries; and protection too can be granted only to human beings. It would be a misconstruction of the doctrine of effectiveness to say that sovereignty over completely uninhabited lands presupposes in every case actual occupation.[22]

Consequently, von der Heydte contends that the symbolic appropriation of completely uninhabited and seldom visited territory is sufficient for the acquisition of sovereign title.[23]

Dickinson, too, concurs with the *Clipperton Island* award. Asserting, in fact, that the arbiter's decision confirms the vitality of the principle of effective occupation, the jurist contends that the findings of the case may be applied to the Arctic regions in the determination of the requisite level of occupation needed to secure title.

> [W]hat are the requisites of "use and settlement" in a particular case, and especially in a case involving those parts of the earth which are incapable of the traditional kind of occupation? What of uninhabited and uninhabitable islands, or the arctic or antarctic regions....If the requisites of occupation are the same for these areas as they were for the great continents discovered in the 15th and 16th centuries, then the doctrine of occupation has obviously lost its vitality and legislation is required. The award in the Clipperton Island case reaffirms the continued vitality of the doctrine. In effect, it is held that the occupation which is required is such an occupation as is appropriate and possible under the circumstances. It is a question of fact. This is a realistic and altogether satisfactory solution from the legal point of view.[24]

In light of Dickinson's opinion, it would appear that mere acts of fictitious appropriation may constitute appropriate manifestations of effective occupation for the Arctic.

The Norwegian jurist, Smedal, disagrees. Though dealing exclusively with the acquisition of title to polar territories, Smedal rejects the idea that the demand for the effective occupation of polar areas is unjustifiable, and stipulates that the relaxation of the demands for effective occupation must be kept within rigid bounds. "The demand for effective possession is one which must be made by occupation in all latitudes. The polar regions are not excepted from the rule."[25] With regard to the level of effectiveness required to secure occupation, the jurist adds,

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[22] von der Heydte, op. cit., p. 463.

[23] Ibid., pp. 462-463.

[24] Edwin D. Dickinson, "The Clipperton Island Case." Editorial Comment. 27 *American Journal of International Law* (1933), p. 132-133.

> The matter for efficiency must not be impaired so as to become more a matter of form than of reality. If a polar land is to be occupied, it must, here as elsewhere, be required that the land is controlled permanently and efficiently by the occupying State. If this is not the case, other States are not bound to respect the so-called "occupation."[26]

A slightly less extreme, but similar view seems to be shared by Hyde. Although acknowledging that the "...present law concerning occupation and the requisites thereof were attributable to conditions never found in the polar regions,"[27] the jurist advocates that some form of occupation must be required of a state in the exercise of its jurisdiction.

> The rigour of climatic conditions in the polar regions must and does deter the settlement by the peoples of the temperate zones. Those conditions do not, however, to the same degree thwart efforts to control what cannot in a strict sense be settled.
>
> From a *point d'appui*, conveniently located it may exercise regularly a civil or administrative control over a large yet unpopulated area. Although impotent to cause it to blossom as the rose, or to support human life, the claimant state may thus actively engage itself, through the facilities of transportation by air, over the entire district which it claims as its own. By this process it may effectively establish its supremacy. Such action, peculiarly adapted to the conditions of polar life, offers at least a reasonable basis for a claim of sovereignty. While it is not occupation, it is not contemptuous of the modern requirements of the law of nations that demands the exercise of control over what a state claims as its own.[28]

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[25] Smedal, op. cit., p. 33.

[26] Ibid., p. 35.

[27] Charles Cheney Hyde, "Acquisition of Sovereignty Over Polar Territories," 19 *Iowa Law Review* (1934), p. 288.

[28] Ibid., p. 288.

In the light of leading judicial decisions, the opinions of Smedal and Hyde appear to be representative of the general rule of law. In the *Eastern Greenland* case, considered above,[29] the Permanent Court of International Justice acknowledged that tribunals, in deciding cases regarding territorial sovereignty over thinly populated or uninhabited lands, have often been satisfied with very little in the way of actual occupation, provided that no superior claim could be proven to exist.[30] The Court held, however, that

> ...a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.[31]

The Court accepted as evidence of the exercise of sovereign authority such things as the imposition of fines for murders committed in the land, the granting of trade monopolies and the enactment of legislation that suggested the state's authority extended to the whole of the territory.[32]

Of equal significance for its examination of factors representative of the exercise of effective possession over sparsely inhabited territory is the *Minquiers and Ecrehos* judgement of the International Court of Justice. In deciding between the title claims of Britain and France over the two groupings of islets and rocks lying off the French coast, the Court made reference to[33]

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[29] See Chapter two, pp. 42-43.

[30] *Eastern Greenland Case*, op. cit., p. 46.

[31] Ibid., pp. 45-46.

[32] Ibid., pp. 46-48.

[33] *Minquiers and Ecrehos Case*, op. cit., pp. 65-68.

> ...homicide and other criminal proceedings to which were added inquests, the building of huts and the levying of rates in connexion therewith, contracts of sale relating to real property, the levying of customs, official visits, census enumeration, legislation purporting to extend to the area in question, judicial proceedings and the levying of taxes.[34]

It seems evident, therefore, that the display of governing authority over sparsely inhabited land constitutes effective occupation, according to the international courts.

Effective Occupation and the Arctic Archipelago.

With respect to the findings of the Courts, a strong case can be made that Canada, in fact, exercised sufficient authority over the Arctic archipelago by 1930 to rightfully claim sovereign title. The activities of the NWMP, and later the RCMP, in the exercise of authority over the Arctic islands was dealt with at length in the previous chapter. The memorandum sent to Secretary of State Kellogg by the Canadian government, prior to the MacMillan-Byrd expedition, provides a succinct statement about the condition of Canada's occupation of the archipelago in 1925. It reads in part as follows:

> In regard to the duties of members of the Royal Canadian Mounted Police stationed in the Eastern Arctic, it may be added that all the Mounted Police Detachments in the Eastern Arctic are Post Offices and Customs Ports, and the Non-Commissioned Officers in charge have been appointed Postmasters and Collectors of Customs. Furthermore, the duties of members of the Force stationed in the Eastern Arctic include the supervision of the welfare of the Eskimo for the Department of Indian Affairs, educating them as far as possible in the White Man's Laws and issuing destitute relief where necessary, enforcement of all the Ordinances and Regulations of the Northwest Territories, including Game Laws and the protection of Musk Oxen, and the issue of Game, Animal and Bird Licenses to the various Trading Companies, the supervision of liquor permits, the enforcement of the Migratory Birds Convention Act for the Department of the Interior, the enforcement of the Criminal Code and Assistance to the Post Office and Customs Department as set forth in the last paragraph above, as well as to the Department of Mines and Agriculture in the

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[34] L.C. Green, "Canada and Arctic Sovereignty." 48 *Canadian Bar Review*, (1970), p. 746.

> collection of Eskimo material and ethnological and biological specimens.
>
> Members of the Force are also called upon to assist in the taking of the Census and assisting the Director of Meteorological Service in the taking of readings at the different Posts from time to time, and to supply topographical information to the Federal Service. In addition, Police patrols to surrounding settlements and Eskimo villages and also extended patrols to remote points are made by each detachment for the purpose of obtaining the information required.

In addition to the activities of the Mounted Police, further evidence of Canada's occupation of the territory comes from Canadian legislation--enactments that affected the region as a whole. In 1895, by Order in Council, the Arctic islands were divided into provisional districts and incorporated into Canada's territorial boundary. Also, Ottawa amended the Northwest Game Act in 1917, restricting the hunting of the near extinct musk-ox to the Inuit of Canada. Furthermore, Parliament passed an amendment to the Northwest Territories Act in 1925 that required the licensing of all scientists and explorers entering the archipelago. In light of the evidence, it appears that Canada had not only exhibited the intention and will to act as the sovereign over the Arctic islands, but also exercised a level of control that met the standards recognized by the Courts in the *Eastern Greenland* and *Minquiers and Ecrehos* cases as manifestations of effective occupation for sparsely settled and uninhabited territories.

Another indication of the strength of Canada's claim of title to the Arctic islands comes from the opinions of jurists. As early as 1925, American jurist Hunter Miller stated, "...while it cannot be asserted that Canada's title to all these islands is legally perfect under international law, we may say that it is not now questioned and that it seems in a fair way to become complete and admitted."[35] Moreover, even Smedal, the noted champion of effective occupation in all latitudes, said in 1931 that "[a] good precedent of how to take effective possession of polar areas is Canada's handling of the Arctic islands lying north of its coasts."[36]

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[35] Hunter-Miller, op. cit., p. 53.

Although Canada appears to have exercised sufficient control over the Arctic islands for a legitimate claim of title to be established by 1930, Ottawa, in an effort to maintain this title,[37] has taken strides to reinforce its occupation of the region. For instance, social security benefits, in the form of Family Allowance cheques, were introduced to the residents of the region in 1952.[38] In the interests of national security, Canada has also established permanent military facilities in the archipelago, such as Alert at the most northerly tip of Ellesmere Island and Qausuittuq at Resolute. Although a number of military installations in the far north, such as the Distant Early Warning (D.E.W.) line, are co-operative efforts with the United States, the permanent presence of the Americans does not detrimentally affect the legal status of Canada's occupation. Prior to becoming Canadian Secretary of State for External Affairs in 1948, Lester Pearson wrote,

> The Canadian Government, while ready to cooperate to the fullest extent with the United States and other countries in the development of the whole Arctic, accepts responsibility for its own sector. There is no reason for sharing that responsibility except as part of any regional or general international agreement for cooperation and control which may be worked within the framework of the charter of the United Nations. During the war the United States Government asked permission of Ottawa to establish certain weather and emergency installations in upper Frobisher Bay and Cumberland Sound on Baffin Island, as well as air bases at Coral Harbor on Southampton Island and Cape Dyer on Baffin Island. This permission was, of course, granted, but as a war measure on a temporary basis, subject

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[36] Smedal, op. cit., p. 35.

[37] According to Huber: "[I]t cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist..."*Palmas Case*, op. cit., p. 839.

[38] Elizabeth Chant Robertson, "Family Allowances in the Canadian Arctic." *The Polar Record*, v.6, No. 43 (January 1952), p. 345.

> to the right of Canada to replace the stations, and to the stipulation that all permanent facilities with respect to the air bases, having been paid for in full, should become the property of Canada after the war.[39]

That this situation had not changed with the D.E.W. line operations was evident from the statement of Canadian Prime Minister St. Laurent that U.S. ships must apply for waivers to the Canada Fishing Act (1952)[40] in order to service these facilities.

> When arrangements were being made for the construction of the distant early warning line Canada and the United States agreed that the United States should be responsible for the sea supply of the D.E.W. Line while it was being built....Canada has always been consulted when the plans for the convoys were being made each year....Incidentally, each year the United States navy has been required to apply for a waiver of the provisions of the Canada Shipping Act, since the cargo ships they charter operate in Canadian coastal waters.[41]

With the application for waivers to the Canada Shipping Act, the United States indicates its recognition that the waters of the archipelago are under Canadian jurisdiction.[42] This implies that the United States recognizes Canada's title to the Arctic Islands since the jurisdiction enjoyed by a state over neighbouring waters is determined by the state's territorial sovereignty.

Despite its continued occupation of the Arctic islands, perhaps the best indication of Canada's legal hold on the territory is the fact that no state has challenged Canada's claim of sovereignty.[43] Speaking before the House of Commons in 1959, the Secretary of State for External Affairs of Canada stated that "[a] search of departmental records has failed to disclose any dispute since 1900 between Canada and either the Union of Soviet Socialist

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[39] L.B. Pearson, "Canada Looks 'Down North.'" 24 *Foreign Affairs* (1945-1946), nos. 1-4, p. 641.

[40] Revised Statutes of Canada, 1952, vol. 1, c. 29.

[41] Canada, House of Commons, Debates (April 6, 1957), pp. 3185-3186.

[42] Head, op. cit., p. 218.

[43] Ibid., p. 216.

Republics or the United States of America concerning the ownership of any portion of the Canadian Arctic."[44] As Head contends, "[t]he U.S.S.R., having incorporated the sector theory as part of its national policy,[45] would display inconsistency if it denied the Canadian claim."[46] As for the United States, the other superpower intimately involved with the Arctic, it has "...never officially made any claim to any known Arctic lands outside of our well recognized territory...,"[47] according to Hunter-Miller.

Canada, on the other hand, has long held that the Arctic islands are Canadian possessions. As early as 1907, Sir Richard Cartwright made the following statement in defence of the government's actions regarding the acquisition of sovereignty to the territory:

> ...I may state to my hon. friend (Senator Poirier) that the importance of having the boundary of Canada defined to the northward has not at all escaped the attention of the government. They have, as the hon. gentleman knows, sent out an expedition very recently to that region, and have established certain posts, and they have likewise exercised various acts of dominion. They have, besides establishing the posts I have referred to, levied customs duties and have exercised our authority over the various whaling vessels they have come across, which, I think, will be found sufficient to maintain our just rights in the quarter...I think my hon. friend may rely upon it that the government will take all reasonable precaution to guard against any territory being wrested from us, even if it does appear at present to be of a rather unproductive character.[48]

Prime Minister St. Laurent declared in 1953 that "[w]e must leave no doubt about our active occupation and exercise of our sovereignty in these lands right up to the pole."[49]

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[44] Canada, House of Commons, Debates (1959), v. 1, p. 1822.

[45] The Sector theory and the Soviet Union's national policy will be discussed later in Chapter 4.

[46] Head, op. cit., p. 216.

[47] Hunter-Miller, op. cit., p. 54.

[48] Canada, Senate, Debates, 1906-07, p. 274.

[49] Canada, House of Commons, Debates (1953-54), v. 1, p. 700.

Furthermore, External Affairs Minister Clark said before the House of Commons on September 10, 1985 that

> Canada is an Arctic nation. The international community has long recognized that the Arctic mainland and islands are a part of Canada like any other, but the Arctic is not only a part of Canada, it is a part of Canadian greatness. The policy of the Government is to preserve that Canadian greatness undiminished. Canada's sovereignty in the Arctic is indivisible. It embraces land, sea and ice. It extends without interruption to the seaward-facing coasts of the Arctic islands. These islands are joined, and not divided, by the waters between them. They are bridged for most of the year by ice. From time immemorial Canada's Inuit people have used and occupied the ice as they have used and occupied the land. The policy of the Government is to maintain the natural unity of the Canadian archipelago and to preserve Canada's sovereignty over land, sea and ice undiminished and undivided.[50]

In light of Canada's long involvement with the Arctic archipelago, continually exercising its jurisdiction there and excluding foreign states, Canada has established and maintained sovereign control of the region. Although the existing administrative apparatus may not be so extensive as to secure a perfect claim of title in international law, it is better than the possible claims of other states. According to the Court in the *Eastern Greenland* case,

> Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power. In most of the cases involving claims to territorial sovereignty which have come before an international tribunal, there have been two competing claims to the sovereignty, and the tribunal has had to decide which of the two is the stronger....[51]

That said, Canada's claim of sovereign title being superior to that of any other state, the controversial issue of the Sector theory shall be examined to discern whether it reinforces Canada's legal title to the Arctic archipelago.

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[50] Canada, House of Commons, Debates (Sept. 10, 1985), v. 5, p. 6463.

[51] *Eastern Greenland Case,* op. cit., p. 46.

The Sector Theory.

Even though the doctrine of effective occupation lay at the center of Canada's efforts to secure sovereign control of the Arctic archipelago, the pace at which the process of administration was taking hold in the region shortly after the turn of the Twentieth Century was agonizingly slow for some public officials. As discussed above,[52] Canadian Senator Pascal Poirier, leery of American activities in the archipelago and suspicious of their intentions, sought to safeguard Britain's Arctic claims by moving the government of Canada to declare officially its possession of the islands of the archipelago, all the way to the North Pole.[53] In support of this motion put before the Senate on February 7, 1907, Poirier advocated the institution of Arctic sectors as one of four grounds on which a claim of ownership to the Arctic islands could be based. The idea is reasonably simple in its construction, requiring only two components:

> ...a base line or arc described along the Arctic Circle through territory unquestionably within the jurisdiction of a temperate zone state, and sides defined by meridians of longitude extending from the North Pole south to the most easterly and westerly points on the Arctic Circle pierced by the state. Under the theory, nations possessing territory into the Arctic regions have a rightful claim to all territory--be it land, water or ice[54]--lying to their north.[55]

Using meridians of longitude in this manner, Poirier envisioned a plan that would provide sectors for Norway--Sweden, the Muskovite Empire, the United States and Canada.[56] It was a method of territorial delimitation for the Arctic that Poirier found "...most natural, because it is simply a geographical [matter]. By that means difficulty would be avoided, and there would be no cause for trouble between interested countries."[57] Apparently in the interests of appeasement, the Senator regarded the creation of an American sector between 141° w. and 170° w.[58] as sufficient enticement for the U.S. to abandon its interests in the archipelago and not to challenge a Canadian declaration of possession to the region.

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[52] See Chap. 3, pp. 71-72.

[53] Canada, Senate, Debates, 1906-07, p. 266.

[54] Under Poirier's conception of the Sector theory, it is apparent that the principal concern is the establishment of sovereign title to land territory located in the Arctic. Poirier makes no mention of rights to the waters or ice formations of the archipelago, nor is any such notion implied. It is with the interpretation of the sector theory by such noted Soviet jurists as Korovin and Lahktine that rights to water and ice become an issue. See Korovin in Taracouzio, *Soviets in the Arctic*. (New York: Macmillan, 1938), p. 348-9, note 27; Lakhtine, op. cit., p. 712.

[55] Head, op. cit., pp. 202-203.

[56] Canada, Senate, Debates, 1906-07, p. 271. Poirier's sector theory was intended for territorial delimitation in the Arctic, but it is equally applicable to the Antarctic. Its application to the Antarctic will be discussed below.

Although paternity for the Sector theory is largely attributed to Poirier, the idea of delimiting territory by way of meridians of longitude was not unique to Poirier's scheme, but dates back at least to the late Fifteenth Century.[59] With regard to the Arctic, the 141st meridian west had already been used in 1825 to designate the eastern boundary of the Russian territory of Alaska.[60] As stated above, Canada, too, was not unfamiliar with the concept, having used the 60th and 141st meridians west to form part of the provisional boundary for the district of Franklin in 1897.[61] Ottawa, however, in the establishment of this boundary, employed the meridians of longitude only where they proved practical in delimiting Canada's legitimate Arctic jurisdiction, choosing instead to fix its most northerly territorial limits along the outer reaches of the archipelago's islands.[62]

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[57] Ibid.

[58] Ibid.

[59] For instance, the Papal Bull *Inter Caetera*, issued by Alexander VI on the 4th of May 1493, granted Spain "...all islands and mainlands found and to be found, discovered and to be discovered towards the west and south, by drawing and establishing a line from the Arctic pole...to the Antarctic pole...the said line to be distant one hundred leagues from any of the islands commonly known as the Azores and Cape Verde." F.G. Davenport, *European Treaties Bearing on the History of the United States and Its Dependencies*. (Washington: Carnegie Endowment for International Peace, 1917), p. 75. For an explanation of the supposed divine right of the Papacy to confer title to land, see: Lindley, op. cit., pp. 124-128; Head, op. cit., p. 200, note 2.

[60] *Consolidated Treaty Series*, vol. 75 (1824-25), op. cit., p. 96, at 98.

[61] See Chap. 3, p. 72, and note 74.

[62] See Chap. 3, pp. 54, 56.

Senator Poirier, on the other hand, sought to extend the 60th and 141st meridians west to the North Pole, and, since it was simply a geographical matter, purported that the right of possession to the entire region encompassed by the sector would naturally fall to Britain. As with all states whose mainland extends into the Arctic regions, the right of possession to the territory lying within its allotted sector would be secured solely by the geographical relation of the state to the region in question. As Poirier explained to the Senate, "[a]ll the lands between the two lines [of longitude] up to the north pole should belong and do belong to the country whose territory abuts up there.[63]...Every country bordering on the Arctic regions would simply extend its possessions up to the north pole."[64] By way of Poirier's Sector theory, the right of possession to Arctic territory would result not from the exercise of effective occupation, but from the geographic proximity[65] of the state to the territory lying to its north. It is this theory of Arctic sectors that has spawned considerable controversy.

Legal Justification for the Sector Theory.

Although boundary treaties--the 1825 Treaty between Great Britain and Russia[66] and the 1867 Treaty between the United States and Russia[67]--have been looked to as legal justification for the sector theory,[68] it is generally contended that the doctrine of contiguity forms the foundation upon which the sector theory rests. For his part, Senator Poirier places some reliance on contiguity in the defense of his 1907 motion, invoking "...the theory that the frontage of the seaboard carries with it the strip of land all the way across the continent."[69] Poirier was referring to the Hinterland theory--one of a number of geographic theories, though with the occasional nuance, that are synonomous with contiguity.[70]

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[63] Canada, Senate, Debate, 1906-07, p. 271.

[64] Ibid.

[65] Geographic proximity is another name for the doctrine of contiguity which will be discussed below.

[66] See Chap. 4, note 61.

[67] *Consolidated Treaty Series*, vol. 134 (1867), op. cit., p. 332.

[68] The primary proponents for a treaty based legal justification for the sector theory are: David Hunter-Miller, op. cit., pp. 57-60; and W. Lakhtine, op. cit., pp. 715-717. An excellent critical examination of this thesis is provided by Pharand, op. cit., pp. 12-27.

The notion of contiguity came to be developed in the mid-nineteenth century as the community of nations was coming to terms with the harsh realities of the principle of effective occupation. As discussed above, the common abuse of the doctrine of discovery and fictitious appropriation had led to the extreme change in international law's regulations for the acquisition of sovereign title to territory. Although effective occupation's requisite features have come to be more liberally interpreted,[71] initially these conditions were stringently applied. Hence, as opposed to the inconsequential rules of the discredited doctrine of discovery and fictitious appropriation, the principle of effective occupation required a claimant state not only to demonstrate an intention to occupy, but also to occupy in fact the territory in question.[72] It was this latter demand that proved troublesome as states, often in competition for valued, unoccupied land, questioned their ability to occupy expediently a territory that was sufficient in size to provide for their future prosperity and security before rival claims could be established. The stringent conditions of effective occupation resulted in the emergence of the doctrine of contiguity. In its general construction, the doctrine holds that

> ...the effective occupation of part of a region or territory gave title to the whole of the unoccupied region or territory proximate enough to be considered as a single geographic

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[69] Canada, Senate, Debates, 1906-07, p. 270.

[70] Pharand, op. cit., p. 28.

[71] Contemporary interpretation of the principle of effective occupation, especially in regard to less temperate locales, is discussed above. See Chap. 4, pp. 85-94.

[72] Pharand, op. cit., p. 28.

> unit with the occupied portion. The same doctrine, with the occasional nuance, has been presented under different names, in particular the following: proximity, propinquity, hinterland, adjacency, continuity, geographic unity and region of attraction.[73]

The development of contiguity was an interventionary step, an attempt to circumvent effective occupation's demand that a territory be actually occupied in order for sovereign title to be secured. In some respects, contiguity appears to have incorporated present practice with that of the past. It seems reasonable to contend that contiguity constitutes a composite of effective occupation and discovery and fictitious appropriation. By right of a state's occupation of a portion of territory, often along coastal regions, the claimant state also lays claim to an indefinite area of unoccupied territory of the hinterland. As with the limits of territory claimed under the much maligned practice of discovery and fictitious appropriation, the limits of territory claimed under contiguity are largely unknown as the doctrine is inadequate to determine the extent of territory that is included with a state's occupation. This problematic feature of contiguity is most apparent with the European experience regarding the occupation of Africa.

> [T]he principle of contiguity was invoked under the guise of a claim, sometimes set up by the Powers which had taken possession of part of the coast of the continent, to an indefinite area of the hinterland, or adjoining interior country.
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> While the Powers were engaged in taking possession of the African coast, there was practically unlimited area of interior country available, and each coastal settlement was free to expand into the interior in accordance with the theory of hinterland. It was, moreover, generally recognized that it would be unreasonable and impolitic to coop up the settlement within a narrow strip of land along the coast....[74] But when the expansion inland had become general, and a large part of the interior of the continent had been appropriated, the hinterland doctrine was inadequate to determine the extent of inland territory that a coastal settlement carried with it.[75]

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[73] Ibid.

[74] Lindley, op. cit., pp. 234-235.

[75] Ibid., p. 235.

Recognizing the potential for difficulty as occupation become more dense, the 1884 Berlin Conference was convened. It laid down two fundamental principles that were to govern future territorial acquisition on the African continent: (1) future title claims had to be effectively occupied to a degree sufficient to ensure order and commercial freedom; (2) all interested parties had to be notified of title claims.[76] As discussed above, although effective occupation evolved into a general principle of international law, the findings of the Berlin conference applied only to the African continent and bound only those states that were signatories of the agreement.[77]

Despite the implicit rejection of the hinterland theory by the Berlin conference, it remains to be seen whether contiguity provides a legal justification for the sector theory. It must be discerned whether the doctrine of contiguity is recognized in international law as a means capable of generating title to territory in the polar regions. Since the sector theory is a unique scheme of territorial delimitation for the polar regions, equally applicable to the Arctic and Antarctic, it is the practice of states with territorial claims in the Arctic and Antarctic that this paper will first address to examine the legal status of the doctrine of contiguity.

Contiguity and State Practice in the Arctic.

The doctrine of contiguity has received some support in Canada. Senator Poirier invoked the hinterland theory in defense of his notion of Arctic sectors, but more than a decade transpired before it was given any sort of official sanction. Dealing with Canada's claim to the Arctic archipelago in relation to any claim Canada could have made to Wrangel island, Joseph Pope, Under-Secretary of State for External Affairs, stated in a memorandum of November 25, 1920:

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[76] *Consolidated Treaty Series*, vol. 165 (1885), op. cit., pp. 485-502. (French Text).

[77] See Chap. 2, p. 39, note 46.

> Essentially, [Wrangel island] is an Asiatic island. The idea of Canada laying claim to it was originally suggested by Mr. Stefansson as a convenient base for exploration in the Arctic Ocean, but the proposal did not find favour with the members of the Advisory Board. It was generally considered that any pretensions we might have to this island must be of a very unsubstantial character, and could only result in weakening our legitimate claims to the Arctic islands contiguous to our own territory, for if we can go so far afield as Wrangel to take possession of islands, unconnected with Canada, what is there to prevent the United States or any other power, laying claim to islands far from their shores but adjacent to our own.
>
> Our claim to the islands north of the mainland of Canada rests upon quite a different footing, by reason of their geographical position and contiguity.[78]

In 1924, Charles Stewart, Minister of the Interior, again invoked the doctrine of contiguity when asked whether other countries were making claims of sovereignty to any of the archipelago's islands.[79] Before the House of Commons, Stewart stated, "[o]f course my hon. friend is aware that international law, in a vague sort of way, creates ownership of unclaimed lands within one hundred miles of any coast, even if possession has not been taken. At least there is a sort of unwritten law in that respect."[80] During the early 1920's, when Ottawa had yet to extend its occupation of the Arctic islands to the northern reaches of the archipelago, when Denmark refused to recognize Canada's claim to the northern extremes of the archipelago, and when the American MacMillan-Byrd expedition went in search of undiscovered territory north of Ellesmere Island by air, the government of Canada placed some reliance on contiguity in support of its Arctic claims. Both Pope[81] and Stewart,[82] however, recommended that Ottawa establish a permanent state presence in those areas not yet occupied by Canada, presumably due to the recognition that the doctrine was inadequate to determine the extent of Arctic territories that were included within Canada's territorial jurisdiction.[83]

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[78] *Documents on Canadian External Relations*, Vol. 3 (1919-25). (Ottawa: Department of External Affairs), pp. 568-9.

[79] Canada, House of Commons, Debates (April 7, 1924), v. 2, p. 1111.

[80] Ibid.

[81] *Documents of Canadian External Relations*, op. cit., p. 569.

[82] Canada, House of Commons, Debates (April 7, 1924), v. 2, p. 1111.

The Soviet Union has also invoked the doctrine of contiguity in support of its sovereignty claims to the Arctic islands lying to the north of its mainland. "The Russian Government," according to Lakhtine, "in relatively early years took steps to secure its rights over contiguous Polar regions."[84] Based on a number of significant Arctic discoveries between 1913 and 1914 by the Russian mariner Vilkitski,

> ...the Russian Minister of Foreign Affairs, B. Sturmer, on September 20, 1916, notified the governments of all the allied and friendly Powers of the fact that these islands (Vilkitski Island, the land of the Czar Nicholas II, the island of the Tsesarevitsh Alexsei, and Starakadomski and Novopashenni islands) had been incorporated within the territory of the Russian Empire, as well as the islands Henriette, Jeanette, Bennet, Herald and Ouedinenie, which together with the islands of New Siberia, Wrangel, and others[85] *situated near the Asian coast of the empire, form a northern extension of the Siberian continental upland.* [86]

In addition, the special memorandum of November 4, 1924, was sent to all states by the Peoples Commissariat for Foreign Affairs, reiterating the 1916 notification of Russian title to the above mentioned Arctic islands.[87] Again, the expression 'close to the asiatic coast' was used.[88] Furthermore, a similar reference to contiguity was contained in the note accompanying the 1926 Decree of the Presidium of the Central Executive Committee of the U.S.S.R. that outlined the limits of the Soviet Arctic sector.[89] The note referred to 'the part of the Arctic regime adjacent ot the northern coast of the Union.'[90]

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[83] According to Hyde, it would appear that Canada has not seen fit to rely solely on any one means other than effective occupation to secure its sovereign title to the Arctic islands: "Canada is understood to approve generally of the sector system, of which one of its statesmen was an early protagonist. The Dominion appears, however, to deem it necessary to fortify its position by other processes, and to endeavor in fact to exert a degree of administrative control over adjacent polar areas which it claims as its own." Hyde, op. cit., p. 290.

[84] Lakhtine, op. cit., p. 707.

[85] The majority of these islands were renamed the Archipelago of Taymir, while the land of Czar Nicholas II was named North Land and the island of Tsesarevitsh Alexsei was called Small Taymir. Ibid., p. 708, note 6.

[86] Ibid. Emphasis added. The original French text of the Russian Note is located in W. Lakhtine's 1928 book *Rights Over the Arctic*. (In Russian). According to Pharand's translation, the significant section of this note reads: '...close to the asiatic coast of the Empire and a northern extension of the Siberian continental platform (platforme continentale)'. Pharand, op. cit., p. 30.

Although Canada and the Soviet Union have invoked the doctrine of contiguity in support of their respective Arctic claims, the other Arctic states--the United States, Norway and Denmark--have rejected the notion of contiguity.

Although ultimately dispelling contiguity as a legal means to acquire title to territory, the United States was perhaps the first state to make use of the doctrine. During the 1826-27 negotiation between the U.S. and Britain over the Oregon territory, the United States Commissioners contended that the extensive occupation of the Mississippi valley, including Louisiana, by U.S. citizens constituted "a strong claim to the westwardly extension of that province over the contiguous vacant territory, and to the occupation and sovereignty of the country as far as the Pacific Ocean."[91] This position was apparently maintained by Secretary of State Calhoun who, in a letter to British Minister Pakenham on September 3, 1844, wrote,

> That continuity furnishes a just foundation for a claim of territory, in connection with those of discovery and occupation, would seem unquestionable. It is admitted by all, that neither of them is limited by the precise spot discovered or occupied. It is evident that, in order to make

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[87] Lakhtine, op. cit., p. 708.

[88] Pharand, op. cit., p. 30.

[89] Lakhtine, op. cit., p. 709.

[90] Pharand, op. cit., p. 30.

[91] Sir Travers Twiss, *The Oregon question examined, in respect to facts and the law of nations.* (London: Longman, Brown, Green, and Longmans, 1846), p. 310.

> either available, it must extend at least some distance beyond that actually discovered or occupied; but how far, as an abstract question, is a matter of uncertainty. It is subject, in each case, to be influenced by a variety of considerations.[92]

Despite the above submissions, however, the U.S. did not include contiguity as a basis for its claim to the territory.[93] Furthermore, James Buchanan, Calhoun's successor as Secretary of State, abandoned the contiguity argument[94] in concluding the 1846 treaty[95] that designated the 49th degree of latitude as the boundary separating the respective territories of the U.S. and Britain.

The U.S. attitude toward contiguity, particularly as it applies to islands, was solidified in two subsequent territorial controversies. In the 1852 dispute with Peru over the Lobos Islands, Secretary of State Webster discounted the Peruvian argument based on contiguity. Referring to the cannon-shot rule that territorial jurisdiction extends three marine miles seaward from the coast, Webster asserted that "[t]he Lobos Islands l[ie] in the open ocean, so far from any continental possessions of Peru as not to belong to that country by the law of proximity of adjacent position...."[96] Moreover, Webster contended that contiguity is no substitute for effective occupation because "...the Government of that country [must prove to have] exercised such unequivocal acts of absolute sovereignty and ownership over them as to give her a right to their exclusive possession, as against the United States and their citizens, by the law of undisputed possession."[97]

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[92] John Bassett Moore, *A Digest of International Law.* (Washington: Government Printing Office, 1906), p. 264.

[93] According to diplomatic correspondence, the U.S. based its claim on the 1803 cession of Louisiana, the 1819 transfer of the Spanish rights to the U.S., the explorations of Captain Gray and of Lewis and Clark, and the establishment of fur trading posts in the region. Pharand, op. cit., p. 29.

[94] Ibid.

[95] *Consolidated Treaty Series,* Vol. 100 (1846-47), op. cit., pp. 40-42.

[96] Moore, op. cit., p. 265.

[97] Ibid.

In addition, in the 1873 dispute with Haiti over the Island of Navassa, Secretary of State Fish upheld the U.S. opposition to the doctrine of contiguity. Using a similar argument as that of his predecessor, Fish maintained

> ...that as Hayti was unable to show an *actual possession and use* of the island, or an extension and exercise of jurisdiction and authority over it, before the discovery of guano by the Americans, in 1857, her pretension of proprietorship of, and sovereignty over, the island was inadmissable, and that the absense of proof of such acts on her part could not be supplied by the fact of the proximity (estimated to be 27 1/2 to 35 miles from the southwest part of Haiti) of the island to her territory, and that the island had, up to that date of the recent discovery, remained a wilderness.[98]

According to U.S. practice, effective occupation remains the fundamental condition for the generation of title to land, while it appears that contiguity, as it applies to islands, is only of legal consideration when the land in question lies within the territorial waters of the claimant state.

With regard to Norway and Denmark, both countries refuse to ascribe the notion of contiguity with any legal significance in the acquisition of sovereign title to territory. This was made clear during their respective oral arguments in the dispute over Eastern Greenland. The counsel for Norway contended that Denmark was relying on contiguity as a basis for its claim to the region,[99] and went on to condemn the doctrine.[100] In reply, the Danish counsel vigorously denied the charge.[101] As Pharand contends, "[r]egardless of whether or not Denmark was in fact placing some reliance on the contiguity doctrine, what is important is that both Norway and Denmark denounced it as a possible legal basis of territorial sovereignty."[102] Since the controversy, neither Norway or Denmark has given any indication that their attitudes toward contiguity have changed.

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[98] Ibid., p. 266.

[99] *Legal Status of Eastern Greenland* (1933) Permanent Court of International Justice Publications, Series C, No. 66. , pp. 3239-45.

[100] Ibid., p. 3270.

[101] Ibid., No. 63, p. 747.

Contiguity and State Practice in the Antarctic.

Although the 1959 Antarctic Treaty[103] has indefinitely suspended territorial acquisition in the Antarctic[104]--no new claims may be established and existing claims may not be altered so long as the treaty is in force--seven territorial claims exist.[105] In keeping with Poirier's scheme, six of these claims[106] are in the shape of sectors, constructed along lines of longitude that extend from the coast to the South Pole.

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[102] Pharand, op. cit., p. 34.

[103] 1959 Antarctic Treaty. Signed at Washington on December 1, 1959. Reproduced in W.M Bush, *Antarctic and International Law.* Vol. 1. (New York: Oceana Publications, Inc., 1982), pp. 46-51.

[104] According to Arcticle IV, 2: "No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force." Ibid., p. 47. See also: Kenneth R. Simmonds, *The Antarctic Conventions.* (London: Simmonds and Hill Publishing Ltd., 1993), p. 51.

[105] The seven existing claims are as follows: all islands and territories between 20° w. longitude and 50° w. longitude, south of 50° s. latitude and between 50° w. longitude and 80° w. longitude, south of 58° s. latitude were claimed by Britain as dependencies of the Falkland Islands. Letters Patent, 28 March 1917. Reprinted in *International Law Documents.* Vol. XLVI 1948-49. (Washington: United States Government Printing Office, 1950), p. 233. The Falkland Islands and Britain's claim to Antarctica have been historically linked, although in 1962 Britain separated those territories lying south of 60° S. latitude from the Falkland Islands Dependencies. Emilio J. Sahurie, *The International Law of Antarctica.* (New Haven: New Haven Press, 1992), p. 13, Pharand, op. cit., pp. 70-71. Australia claims all territory between 45° e. longitude and 136° e. longitude, and between 142° e. longitude and 160° e. longitude, south of 60° s. latitude. British Order in Council, 7 February 1933. *International Law Documents*, op. cit., p. 236. The territory in between - 136° e. longitude to 142° e. longitude, south of 60° s. latitude - is claimed by the French; Presidential Decree, 1 April 1938. Ibid., pp. 230-31. The Ross Dependency is claimed by New Zealand and it stretches from 160° e. longitude to 150° w. longitude, south of 60° s. latitude. British Order in Council, 30 July 1923. Ibid., p. 235. The Argentine Antarctic sector overlaps much of the British claim, stretching from 25° w. longitude to 68° 34' w. longitude, south of 60° s. latitude. Letter to British Ambassador from Argentine Minister of Foreign Relations, 3 June 1946. Ibid., p. 223. Chile, too, claims much of the territory incorporated within the British and Argentine sectors. Its sector extends from 53° w. longitude to 90° w. longitude, south of 60° s. latitude. Presidential Decree, 6 November 1940. Ibid., p. 224. Lastly, Norway's claim in the Antarctic reaches from 20° w. longitude to 45° e. longitude, south of 60° s. latitude. Royal Proclamation, 14 January 1939. Ibid., p. 243. Norway does not, however, extend its sector to the South Pole. See also: Sahurie, op. cit., pp. 12-31; Pharand, op. cit., pp. 70-74.

While all the claimant states, but New Zealand, have taken strides to establish a permanent presence in the Antarctic,[107] there remains some debate as to the role the doctrine of contiguity plays in support of these sovereignty claims. Pharand, for instance, contends that "[m]ost claimant states...might be said to rely on the...hinterland doctrine, in the sense that their occupation of the coastal territory is the main basis for their claim to the whole sector ending at the South Pole."[108] Triggs, on the other hand, cautions that the use of sectors "...is (also) a simple, convenient and readily ascertainable means by which a territorial claim may be described. In this sense a sector does not constitute the basis of title, but is merely a means of describing it."[109]

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[106] Norway is the exception. Due to its opposition to the sector theory, Norway's claim does not extend beyond 81° s. latitude.

[107] See Sahurie, op. cit., pp. 12-31.

[108] Pharand, op. cit., p. 38. Waldock appears to be in agreement with Pharand's assessment, but he does distinguish between geographic continuity and contiguity as the bases for these claims. Writing in 1948, the distinguished jurist contends: "[T]he essence of the Antarctic sectors of the United Kingdom, Australia, New Zealand, France, and Norway is to define the boundaries of their mainland territories. These sector claims are therefore based fundamentally on the principle of geographical continuity of territory. Indeed they are nothing more or less than new examples of the old hinterland doctrine." C.H.M. Waldock, "Disputed Sovereignty in the Falkland Island Dependencies." 25 *British Yearbook of International Law* (1948), p. 341. With regard to the sector claims of Argentina and Chile, Waldock states that they, on the other hand, are based on contiguity. As opposed to Pharand's general description of the doctrine of contiguity used above, Waldock's definition is more specific: "'Contiguity' is the name given to the doctrine sometimes invoked in support of claims to islands lying near to a state's territory but outside its territorial waters." Ibid. In explanation, the jurist goes on to assert that the Argentine and Chilean Antarctic sectors "...are, quite plainly, contiguity claims, not being founded on the occupation or even discovery of Antarctic territories. As the territories claimed are separate from South America by a considerable expanse of sea, the argument of contiguity is reinforced by reference to geographical similarities with the implication that the disputed territories are geologically united with South America." Ibid.

[109] Gillian D. Triggs, *International Law and Australian Sovereignty in Antarctica*. (Sydney: Legal Books Pty. Ltd., 1986), p. 89. It seems rather improbable, based on the levels and areas of occupation, that the majority of the claimant states in the Antarctic, as suggested by Trigg, employ sectors merely as a convenient means by which to delimit their respective territorial claims. In such a circumstance, the territory encompassed within the specified lines of longitude would have to be shown to be effectively occupied by the claimant state if these lines are to be of any legal consequence. As Waldock explains: "Lines of longitude are somewhat arbitrary indications of geographical unity, taking no account of physical features such as glaciers, mountain ridges, or sled routes. Yet it is just conceivable that in the desolate, uninhabited areas of the South Pole the Court might accept sectors as a convenient method of defining the extent of the area covered by an effective occupation of any part of the coast of the Antarctic mainland. [However, such territorial] declarations, according to the existing authorities cannot possess any legal value

It appears that only three claimant states in the Antarctic have placed any explicit reliance on the doctrine of contiguity.[110] First of all, Britain, in 1929, informed the Norwegian government that "Great Britain had unimpeachable rights to the whole of these sectors, including all land down to the South Pole, an extension of which was looked upon as the inseparable hinterland of the coastal territory in each sector."[111] The statement's reference to 'sectors' was presumably due to the fact that Britain had laid claim to two distinct sectors by that time: its present Antarctic claims[112] and the sector known as the Ross Dependency that was subsequently transfered to New Zealand jurisdiction.[113]

Argentina, too, has invoked contiguity in support of its Antarctic title claim. In a letter to the Chilean Ambassador dated November 12, 1940, the Argentine Minister of Foreign Relations wrote,

> By reason of this effective and continuous occupation (the establishment and maintenance of a permanent observatory on Laurie Island in the South Orkneys) which has gone on since 1904, the inhabited place which is nearest to the South Pole is Argentine, and our country is the only one 'which has lived there for 37 years and the only one, consequently, which maintains in real form the rule of its sovereignty in the lands of the Antarctic.'
>
> Argentine rights, moreover, are not solely dependent upon the principal fact of this occupation. They are also justified under the subsidiary system admitted for the

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unless the Court is first satisfied that there has been a manifestation of sovereignty over the whole sector and a display of state activity in principal parts of the sector sufficient to raise a presumption of effective occupation of the whole." Waldock, op. cit., pp. 345-346.

[110] Australia is reported to have wanted to invoke contiguity in 1925 to block the French claim to Terre Adelie, but the idea was rebuked by Britain due to possible consequences for its Antarctic claims. Trigg, op. cit., p. 93. Sahurie states that "proximity" has recently resurfaced in statements by Australian officials as an additional justification for its Antarctic claims. Sahurie, op. cit., p. 15. An examination of the statements cited by the author--R. Woolcott, "The Interaction Between the Antarctic Treaty System and the United Nations System." 56 Australian Foreign Affairs Record, p. 17 at 19. (January 1985), and B. Hayden, "Keeping Tension Out of the Last Continent." Ibid., p. 25 at 26--did not find sufficient support to concur with Sahurie's contention.

[111] Dispatch of 23 December 1929 as quoted in W.M. Bush, *Antarctica and International Law*. Vol. II. (New York: Oceana Publications, Inc., 1982), p. 130.

[112] See note 108 above.

[113] Sahurie, op. cit., p. 17.

> attribution of those zones. By reason of the geographical propinquity of both the continental territory of Argentina and of the archipelago of the Malvinas [Falklands] which is also part of the national soil, it would be difficult for another nation to take the place of Argentina on the ground that it had better rights with respect to the attribution of the ownership of this zone. Argentina's title also could scarcely be disputed if the question is to be solved on the basis of the sector which is a prolongation of the American continent.[114]

The basis of Argentina's polar claim, according to the Minister's statement, rests on the proximity of Argentine territory--the Argentine mainland and, more importantly, the Falkland or Malvinas Islands--to the Antarctic. The sovereignty claims of Britain and Argentina to the Falklands has been a point of contention for more than a century, and is intimately related to their rival claims in the Antarctic. As Waldock contends, "...the territories of the Falkland Islands Dependencies are the center of the dispute concerning sovereignty in the Antarctic."[115]

In addition to Britain and Argentina, Chile invoked the doctrine of contiguity, though indirectly, to support its Antarctic claim. In a letter to the Japanese government on November 29, 1940, the Ministry of Foreign Relations stated that

> The Government of Chile...regrets that it cannot accept the reservation of rights formulated by the Japanese Government with respect to territories which are situated in the American Hemisphere, and which belong to our country geographically and by virtue of historic rights and notorious acts of possession.[116]

This assertion of sovereignty in the Antarctic was a precursor to the official declaration of 1950 in which Chile stated that its "...claim is supported by logical geographic continuity and contiguity...in addition to actual permanent occupation."[117]

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[114] Dispatch of 12 November 1940. Translated and reproduced in *International Law Documents*. Vol. XLVI 1948-49. (Washington: United States Government Printing Office, 1950), pp. 220-21.

[115] Waldock, op. cit., p. 311.

[116] Dispatch of 29 November 1940. Translated and reprinted in *International Law Documents*, op. cit., p. 225.

[117] Majorie M. Whiteman, *Digest of International Law*. Vol. II. (Washington: Department of State Publications 7553, 1963), p. 1257.

Like Canada and the Soviet Union in the Arctic, Britain, Argentina and Chile have placed some reliance on the doctrine of contiguity in support of their respective claims in the Antarctic. Due to the contentious nature of their rival claims,[118] and presumably due to their recognition of the doctrine's inability to determine the extent of contiguous territory afforded their claims, all of these states have sought to sustain a sizeable state presence within their claimed territories.

Thus, with regard to the question of whether or not contiguity is recognized as a legal principle capable of generating title to territory, less than half of the states with territorial claims in the Polar regions have afforded it any such legal significance. As a result of this somewhat mixed reaction, it cannot be concluded with any certainty that contiguity constitutes a principle of international law that may serve as a legitimate basis for the sector theory.

Contiguity and International Judicial Opinion.

The leading international judicial decisions, however, have not been nearly so generous in their treatment of the doctrine of contiguity. Several cases are worthy of mention.

Island of Palmas Case:

In the judgement regarding the *Island of Palmas* case,[119] arbitrator Huber deals thoroughly with the doctrine of contiguity and explicitly rejects the notion as a legal principle that is capable of deciding questions of territorial sovereignty. Huber asserts that contiguity is inadequate to extend title to islands that lie beyond a state's territorial waters.[120]

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[118] This is particularly evident in the case of Argentina. See Sahurie, op. cit., p. 19.

[119] *Palmas Case* , op. cit., pp. 831-871.

[120] The arbitral decision in the 1870 *Island of Baluma Case* awarded the island lying of the west coast of Africa near to the Jeba and Rio Grande rivers to Portugal over Great Britain. The judgement was

> Although States have in certain circumstances maintained that islands relatively close to their shores belong to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even Governments of the same State have on different occasions maintained contradictory opinions as to its soundness.[121]

Huber does, however, extend the doctrine some limited application with regard to the possession of a group of islands, but he qualifies this contention with the understanding that contiguity might only be of consequence during the act of first taking possession.

> As regards groups of islands, it is possible that a group may under certain circumstances be regarded as in law a unit, and that the fate of the principal part may involve the rest. Here, however, we must distinguish between, on the one hand, the act of first taking possession, which can hardly extend to every portion of territory, and, on the other hand, the display of sovereignty as a continuous and prolonged manifestation which must make itself felt through the whole territory.[122]

That contiguity is capable only of such limited application is due to the fact that the doctrine is fundamentally in conflict with the concept of sovereignty and its associated rights and duties. As Huber explains,

> ...as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of

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based on the Portugese discovery of the island, its sovereign control of the entire coast opposite the island, and the extremely close proximity of the island to this mainland. John Bassett Moore, *History and Digest of International Arbitrations to which the United States has been a Party,* Vol. II, 1909-1922. (Washington: Government Printing Office, n.d.), p. 1921. As Pharand contends, "this was the case of an island in the territorial waters of a coastal state." Pharand, op. cit., p. 31.

[121] *Palmas Case* , op. cit., p. 854.

[122] Ibid., p. 855.

> contiguity admissable as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results.[123]

In his final assessment of the doctrine of contiguity, the arbitrator bluntly concludes, "[t]he title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law."[124]

Eastern Greenland Case:

Huber's contention that "...international arbitral jurisprudence in disputes on territorial sovereignty...would seem to attribute greater weight to--even isolated--acts of display of sovereignty than to continuity of territory...."[125] appears also to be confirmed by the Permanent Court of International Justice in the *Eastern Greenland* case.[126] Discussed above, in this case, Norway accused Denmark of relying on contiguity as a defense for its supposed failure to occupy effectively the eastern part of Greenland. Despite the denunciation of the doctrine of contiguity as a legal basis of territorial sovereignty by both Norway and Denmark, the Court makes no mention of contiguity in rendering its judgement in favour of Denmark. Furthermore, Judge Anzilloti[127] and Judge *ad hoc* Vogt,[128] in their dissenting opinions, do not deal with contiguity in any manner.[129] The Court's decision is based on various manifestations of Danish state sovereignty--primarily legislative enactments, the implied recognition of Danish sovereignty over Greenland by a Norwegian Foreign Minister, and a number of international agreements implicitly recognizing Danish sovereignty over Greenland. Hence, "[i]t is not possible...to deduce any implied acceptance of the doctine of contiguity by the Court."[130]

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[123] Ibid., pp. 854-855.

[124] Ibid., p. 869.

[125] Ibid., p. 855.

[126] *Eastern Greenland Case*, op. cit., pp. 22-75.

[127] Ibid., pp. 76-95.

[128] Ibid., pp. 97-123.

[129] It has been contended that the Court in fact applied the doctrine of contiguity in its judgement, paying mere lip-service to the principle of effective occupation. Waldock dismisses the argument, contending that "...this is a rationalization of the result of the decision which disregards the expressed *ratio decidendi* of the judgement. Arbitral decisions of the present century have established beyond all doubt that 'effective occupation' does not mean physical settlement of the territory but effective display of state activity." Waldock, op. cit., p. 343.

Minquiers and Ecrehos Case:

As is the case with the *Eastern Greenland* decision, the judgement of the International Court of Justice in the 1953 *Minquiers and Ecrehos* case[131] does not place any reliance on contiguity, nor is the doctrine given any consideration. Although both France and Britain claimed to have an ancient and original title to the small island groupings located in the English Channel, the Court found in favour of the latter's ancient title that was supported by a superior demonstration of state administration and exercise of authority.

The argument of the French government regarding the proximity and geographic dependency of the islands with its coast was considered only by Judge Levi Carneiro in his separate opinion.[132] Although recognizing that proximity was a relevant consideration, Carneiro rejected the contentions of the French government in the following statement:

> The French Government has not indicated what characterized the islands 'close to the coast' or 'to the mainland'. It has not stated what distance form the coast constituted 'proximity'. It referred also to 'dependency'...'dependency on the coast'--which is rather vague. That Government has also stated, and rightly so, that 'the claim that the archipelago constituted a natural unity can only be given its full meaning by taking into consideration the proximity of the coast of the mainland'. (Oral Arguments.) But it has referred to no instrument or document in which the Minquiers or the Ecrehos were regarded as dependencies of the coast or of the Chausey. Of course, the proximity of the coast of the mainland must be taken into consideration, but the natural

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[130] Pharand, op. cit., p. 34.

[131] *Minquiers and Ecrehos Case* , op. cit., pp. 47-72.

[132] Ibid., p. 85-109. French Judge Basdevant does not deal with the contiguity argument in his separate concurring opinion. Ibid., pp. 74-84.

> unity of the archipelago must also be considered at the same time....As is stated by the French Government itself (Oral Argument), The Minquiers and Ecrehos are closer to Jersey than to the mainland. They must be regarded as attached to Jersey rather than to the mainland. They must be included in the archipelago. These islets were, and continue to be, a part of its 'natural unity'. It is for this reason that they remained English, as did the archipelago itself.[133]

Upholding the judgement of the Court, Carneiro found in favour of the closer proximity of the British island of Jersey to the Minquiers and Ecrehos islands, and supported the preservation of the natural unity of the archipelago.

Western Sahara Case:

In 1975, in its advisory opinion to the U.N. General Assembly regarding the legal ties of Morocco and Mauritania to the territory of Western Sahara, the International Court of Justice handed down a judgement[134] that implicitly rejects the notion that contiguity is a legal principle that is capable of generating title to territory. The Court ruled against Morocco's assertions of contiguity since the alleged geographical unity was doubtful, but it also held that even if contiguity were applicable in the present connection, Morocco's claim of immemorial possession would still have to be substantiated with evidence of the display of state authority.

> In the particular circumstances...the paucity of evidence of actual display of authority unambiguously relating to Western Sahara renders it difficult to consider the Moroccan claim as on all fours with that of Denmark in the *Eastern Greenland* case. Nor is the difficulty cured by introducing the argument of geographical unity or contiguity. In fact, the information before the Court shows that the geographical unity of Western Sahara with Morrocco is somewhat debatable, which also militates against giving effect to the concept of contiguity. Even if the geographical contiguity of Western Sahara with Morocco could be taken into account in

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[133] Ibid., pp. 58-9.

[134] *Western Sahara Case*, op., cit., pp. 4-69.

> the present connection, it would only make the paucity of evidence of unambiguous display of authority with respect to Western Sahara more difficult to reconcile with Morocco's claim to immemorial possession.[135]

The judgement of the Court implied that contiguity on its own was inadequate to secure title to territory.

Contiguity and Doctrinal Opinion.

In addition to the practice of states and judicial interpretation, doctrinal opinion has much to offer in the assessment of the doctrine of contiguity. Generally speaking, jurists have largely rejected contiguity as a legal principle capable independently of conferring title to land, but they have not dismissed it outright as having no legal significance whatsoever.

The Russian jurist Lakhtine is perhaps the most outspoken advocate of the doctrine of contiguity as it relates to the Arctic. Lakhtine argues that the nature of the Arctic territories--their remoteness to all but the Arctic littoral states and their hostile environment--renders the principle of effective occupation inapplicable, while contending that the only viable substitute to determine the acquisition of sovereignty is his theory of "regions of attraction."

> [T]he legal principle of 'occupation' as applied to the Arctic and Antarctic has been rendered inapplicable. It has also become evident that in Polar regions 'effective occupation' cannot be realized, and a substitute principle that sovereignty ought to attach to littoral states according to 'region of attraction' is now suggested and practically applied.[136]

In much the same way as Poirier before him, Lakhtine divides the Arctic into sectors, all of which are assigned to the states whose territories reach into the Arctic. By way of explanation, the Russian states,

> It is not due to accident that not a single State can effect the occupation even of those Polar islands that are adjacent to its

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[135] Ibid., p. 35, para. 92.

[136] Lakhtine, op. cit., pp. 704-705.

> coast in a more 'effective' manner than through the establishment of small posts and a periodic patrol by *avisoes*, etc. Therefore, considering Polar conditions, the form of occupation practised today by Polar States is all that can be 'reasonably required.' But this form of occupation of Polar territories can be recognized as sufficient and 'reasonably required' only when carried out by adjacent littoral States, and by no means is it open to non-Polar States which can have no reasonable interests in the Arctic except those that are scientific.[137]

In support of this scheme, Lakhtine repeatedly cites Hunter-Miller who appears to accord contiguity some legal weight in deciding questions of sovereignty. Reporting that Canada had asserted that all Arctic land within the sector defined by the 141° w. longitude and the 60° w. longitude "are Canadian or will be,"[138] the American contends:

> It cannot be said, however, that such a claim as this is wholly without foundation or precedent. It bears some analogy to the 'back country' or 'hinterland' theory regarding territory stretching away from the coast. More accurately, it may be said to rest partly on the notion of 'territorial propinquity' which the United States on one famous occasion recognized as creating 'special relations between countries.'[139]

Hunter-Miller qualifies this statement, however, saying that although "[c]laims to unoccupied territory on the ground of contiguity are not unknown...it cannot be said that there is any well defined or clearly settled principle to support them."[140]

Lindley, too, recognizes that contiguity may have important political consequences,[141] but the jurist dismisses the idea that the doctrine is a source of legal title to territory. Dealing with its application in the polar regions, Lindley says of contiguity,

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[137] Ibid., p. 710.

[138] Hunter-Miller, op. cit., p. 56.

[139] Ibid. Hunter-Miller is presumably referring to the exchange of Notes between the United States and Japan of 2 November 1917 in which the U.S. recognized that Japan had special political interests in China, particularly in that region contiguous to Japanese territory. Lindley, op. cit., p. 231.

[140] Hunter-Miller, pp. 56-57.

[141] Lindley, op. cit., pp. 230-231.

> It does not appear...that the doctrine has acquired any greater legal sanction in its application to those regions than in regard to unoccupied territory in other parts of the world; and if the evident advantages of some such rule for regulating territorial acquisitions in the Arctic and the Antarctic are to be realized, an international agreement upon the point seems to be necessary.[142]

Smedal is also critical of the doctrine of contiguity in general, but he centers his opposition on Lakhtine's "regions of attraction" theory.[143] Taking issue in particular with the assertion that the hostile character of the Arctic renders the principle of effective occupation inapplicable, requiring a substitute principle to take its place, the Norwegian jurist contends:

> The fact that it may be difficult, or in some cases perhaps impossible, at present to take effective possession of a polar land, does not warrant a disregard of the rule in international law relating to occupation. The land must, in that event, continue to be unoccupied. No stipulations exist to the effect that every land shall be submitted to sovereignty, and neither is there any need for such stipulation.[144]

Smedal goes on to say,

> In the theory and practice of international law it is laid down that sovereignty over a No-man's-land must be acquired by occupation, if all the interested Powers are not agreed to place such a land under the sovereignty of a single State....[T]here is no valid reason from departing from this rule in the polar regions. In fact, it cannot be dispensed with, for it cannot be replaced by any other rule to which the comity of nations is willing to adhere.[145]

Hyde is largely in agreement with Smedal, asserting that any relaxation of the principle of effective occupation with regard to the polar regions must be kept within rigid bounds,[146] but the jurist does recognize that contiguity might be of some limited application, at least in the Arctic.[147] Due to the physical connection of Arctic territory to the territory of a claimant state (and here, Canada is used as the primary example), Hyde seems to suggest that the claimant state is in an advantageous position to exercise effective control over the contiguous territory. As a result, it appears that contiguity, in such a circumstance, might be sufficient to establish a presumption of the exercise of requisite power. As Hyde explains,

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[142] Ibid., p. 235.

[143] Smedal, op. cit., pp. 60-62.

[144] Ibid., p. 61.

[145] Ibid., p. 64.

[146] Hyde, op. cit., p. 293.

> In...the Arctic, it might...be recognized that the sovereign of contiguous territory projecting itself into the Arctic Circle was, by reason of that fact, in a position to exercise requisite control over an extensive area, or at least in a position to make proof of the fact.[148]

Nevertheless, Hyde stipulates that contiguity cannot cause the rule of effective occupation to be disregarded. "[T]he doctrine of contiguity should not be permitted to supplant the need of proof, as by acknowledging the possession of control when none was found to exist."[149]

Although critical of Hyde's argument that the doctrine of contiguity was not an appropriate justification for sector claims in the Antarctic due to the continent's geographic characteristics,[150] Waldock appears, however, to concur with the contention of Hyde that contiguity might be capable of establishing the presumption of an effective occupation.

> [A]ny significance that has been attributed by international tribunals to proximity has been not as a legal principle independent of effective occupation but as a fact indicating the extent of an effective occupation.[151]
>
> International law...appears to take account of continuity or contiguity of territory only within the principle

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[147] With regard to the Antarctic, Hyde contends that the doctrine of contiguity and continuity cannot be invoked because of the isolation of the continent. All the claimant states are separated from their respective territorial claims by a considerable expanse of sea. Ibid., p. 291.

[148] Ibid., p. 294.

[149] Ibid.

[150] Waldock, op. cit., pp. 340-41.

[151] Ibid., p. 344.

> of effective occupation. Within that principle proximity may, in certain circumstances, operate to raise a presumption of fact that a particular state is exercising or displaying sovereignty over outlying territory in which there is no noticeable impact of its state activity.[152]

As is evident from the contentions above, contiguity may be of legal consequence when working in conjunction with the principle of effective occupation, but the jurist unequivocally asserts that the doctrine does not constitute a principle of law capable of deciding questions of territorial sovereignty. In dealing with the sector principle and its application in both the Arctic and the Antarctic, Waldock states,

> It is not believed that either form of sector doctrine can by itself be a sufficent legal root of title. The hinterland and contiguity doctrines as well as other geographical doctrines were much in vogue in the nineteenth century. They were invoked primarily to mark out areas claimed for future occupation. But, by the end of the century, international law had decisively rejected geographical doctrines as distinct legal roots of title and had made effective occupation the sole test of the establishment of title to new lands. Geographical proximity, together with other geographical considerations, is certainly relevant, but as a fact assisting the determination of the limits of an effective occupation, not as an independent source of title.[153]

According to more recent writings, by such jurists as Franklin and McClintock,[154] Svarlien[155] and Triggs,[156] it is evident that the status of the doctrine of contiguity in international law has not undergone any fundamental change. Although contiguity might serve as a legal basis for the acquisition of an island within the territorial waters of a coastal state, and while it may be sufficient to link an island with a group of islands or an archipelago--a point of significance to Canada and its claim to the Arctic archipelago, the doctrine is incapable of autonomously deciding questions of territorial sovereignty. Thus, in light of the practice of states and in view of judicial and doctrinal opinion, the doctrine of contiguity cannot serve as a legal basis for the sector theory.

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[152] Ibid.

[153] Ibid., pp. 341-42.

[154] C.M. Franklin and V.C. McClintock, "The Territorial Claims of Nations in the Arctic: an Appraisal." 5 *Oklahoma Law Review* (1952), pp. 37-48.

[155] O. Svarlien, "The Sector Principle in Law and Practice." Vol. 10 *Polar Record.* (1960), pp. 248-263.

[156] Triggs, op. cit., pp. 89-95.

The Sector Theory and Customary International Law.

Although it has been shown that the sector theory cannot rely on the doctrine of contiguity to secure it legal standing in international law, it remains to be discerned whether the sector theory has developed into a principle of customary law--a tenet of international law established when a general practice is regarded as law.[157]

The International Court of Justice, in its judgement regarding the *North Sea Continental Shelf Cases*, dealt with the development of customary law in the following terms:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evident of a belief that this practice is rendered obligatory by the existence of a law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts, is not in itself enough.[158]

It is apparent from the Court's decision that two constituent elements must be shown to exist if a general practice is to constitute a customary principle of international law. Regarding the first feature, the material element, it must be shown that a practice or course of conduct is followed by states in general, particularly those states directly affected by the alleged custom.[159] As for the second feature, the psychological element which is more important and far more difficult to establish positively, it must conclusively be shown that states abiding by the general practice perceive themselves to be under a legal obligation to do so. They must accept the practice in question as legally binding.[160]

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[157] Statutes of the International Court of Justice, Art. 38, para. 1(b). Pharand, op. cit., p. 45.

[158] *North Sea Continental Shelf Cases* (1969) International Court of Justice Reports, 3, at 44.

[159] Pharand, op. cit., p. 45.

This criterion is used to establish general custom, as well as regional custom--a custom pertaining to a certain geographical region. With regard to the latter, however, the second element, the establishment of the custom in question as a matter of legal obligation, is more stringently applied. The Court in the 1950 *Asylum Case* described the burden of proof incumbent on Columbia when it invoked a regional custom regarding the granting of asylum that pertained particularly to Latin America. According to the Court,

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Columbian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the State in question, *and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.*[161]

In rendering its verdict, the Court held that the granting of asylum by the Latin American States was frequently influenced by "...political expediency...[and] that it is not possible to discern...any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence."[162]

In light of the stipulations set by international law regarding the development of customary law, it remains to be determined whether the sector theory may constitute a principle of regional custom with respect to the Arctic, or whether it may, in fact, form a general custom and apply to the polar regions generally. It is to the historical record that this chapter now turns to examine whether the polar states have uniformly employed the sector theory, and whether this practice has come to be regarded by the affected states as legally binding. The account of Canada's involvement with the sector theory is considerably more extensive than is the account of the other polar states, primarily because of the availability of such information.

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[160] Ibid.

[161] *Asylum Case* (1950) International Court of Justice Reports, 266, at 276. Emphasis added.

[162] Ibid., p. 277.

The Sector Theory as Customary Law and State Practice.

The practice of the Arctic states will first be addressed, followed by the examination of state practices in the Antarctic.

The 1878 boundary description proposed by Canadian authorities had sector theory overtones--the 141st meridian west was used partially to delimit the western boundary of the Arctic archipelago--but it was not until 1904 that Canada demonstrated a possible affinity for the sector theory. In that year, the Department of the Interior published a map regarding "Explorations in Northern Canada" that showed the full sector--the 60th and 141st meridians west extending to the Pole. The suggestion that this use of the sector theory was merely a convenient means by which to describe Britain's Arctic territorial possessions must confront the fact that the map's publication coincided with Canada's expressed intentions to extend Ottawa's jurisdictional authority to the farthest reaches of the archipelago. Furthermore, three years later, Senator Poirier's resolution, examined extensively above, was not even put to a vote after Sir Richard Cartwright, the government's representative in the Senate, spoke against the resolution and assured his colleagues that Canada would succeed in extending effective control over the entire archipelago.

The Senator's abortive resolution was resurrected two years later by Captain Bernier, commander of the *Arctic* patrol. On Dominion Day, 1909, Bernier erected a plaque on Melville Island that purported to claim all the Arctic archipelago on Canada's behalf. The inscription of the plaque read,

> This Memorial is erected today to commemorate the taking possession for the DOMINION OF CANADA of the whole ARCTIC ARCHIPELAGO lying to the north of America from long. 60° W to 141° W up to latitude 90° N. Winter har. Melville Island. CGS Arctic. July 1, 1909. J.E. Bernier. Commander.[163]

There is nothing to suggest that Bernier's action was sanctioned by Ottawa. It appears that it may have been a personal act. This contention appears to be somewhat substantiated by Prime Minister Laurier's later warning to Bernier. When it was reported to the Prime Minister that Bernier was said to have proposed, when in New York, that the Arctic States should meet to divide up the polar sea, implying the implimentation of the sector theory,[164] Sir Wilfred Laurier replied: "...if Captain Bernier spoke as he is reported to have spoken, all I can say is that I think he had better keep to his own deck."[165]

Between 1910 and 1924, Canada appears to have placed no reliance on the sector theory to support Britain's title claims to the Arctic archipelago, although there was some uncertainty amongst government officials regarding Ottawa's policy of effective occupation when Denmark refused to recognize Canada's jurisdiction over Ellesmere Island in 1920. Despite these misgivings, the memo of 28 October 1920[166] by the legal advisor to Prime Minister Meighen recommended that Ottawa dispatch a government expedition to the region to assert Canada's jurisdictional authority. Furthermore, it was recommended that Canada refrain from using the 141st meridian west to demarcate the western boundary of Canada's domain, and that the Dominion government encourage the settlement of Wrangel Island. This latter suggestion is of particular interest since Wrangel Island lies in the alleged sector of Russia. Were Ottawa to have been placing some reliance on the sector theory, it certainly would not have encouraged settlement of Wrangel Island. If Canada was concerned to obtain recognition for sector claims from Moscow, it would not have wanted settlement to be construed as the basis for their claim.

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[163] J.E. Bernier, *Master Mariner and Arctic Explorer*. Op. cit., p. 228.

[164] Head, op. cit., p. 207.

[165] Canada, House of Commons, Debates (1909-10), vol. 2., pp. 2711-12.

[166] *Documents on Canadian External Relations*, Vol. 3 (1919-25). Op. cit., p. 568.

Prime Minister Meighen, in a letter to Vilhjalmur Stefansson (the man credited with having discovered the last of the archipelago's islands on Canada's behalf), stated that Canada intended to press its claim to Wrangel Island, and, although subsequent approval by Ottawa was not forthcoming, Stefansson organized a private expedition that raised the Canadian and British flags and took possession of the island on behalf of the British Crown on September 16, 1921.[167] The claim to Wrangel Island was confirmed by the Mackenzie King government in the following year.[168]

By 1925, however, Canada's Arctic policy was going through a period of reevaluation, largely due to the perceived threat to Canada's jurisdictional authority in the high Arctic posed by the American Expedition of MacMillan and Byrd that was intended to verify the possible existence of "Crocker Land" in the Arctic Ocean. Like the Amundsen expedition before them, questions of sovereignty could have arisen were the Americans to locate the undiscovered territory supposedly seen by Commander Peary on his journey to the North Pole. As stated by the Minister of the Interior, Charles Stewart, before the House of Commons,

> ...here we are getting after men like MacMillan and Doctor Amundsen, men who are going in presumably for exploration purposes, but possibly there may arise a question as to the sovereignty over some land they may discover in the northern portion of Canada, and we claim all that portion.[169]

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[167] Pharand, op. cit., p. 48.

[168] Canada, House of Commons, Debates (1922), p. 1769.

[169] Canada, House of Commons, Debates (1925) p. 3773.

Stewart was making reference to the 1925 amendment to the Northwest Territories Act[170] that required scientists and explorers to obtain permits and licences to enter the Northwest Territories. It is evident that the sector theory had come to influence Canada's Arctic policy in light of the statement of the Minister during second reading of the proposed amendment. When asked whether Canadian sovereignty extended to the North Pole, Stewart replied: "Yes, right up to the North Pole."[171] That Ottawa was placing greater reliance on the sector theory is further substantiated by the publication, in 1924, of a map of the Northwest Territories by the Department of the Interior that used the traditional sector lines to delimit Canada's Arctic jurisdiction.[172] Furthermore, in the same year, the Dominion government rescinded any claim it may have had to Wrangel Island.[173]

Over the next three decades Canada continued to invoke the sector theory. The publication of maps and the development of legislation pertaining to the Arctic archipelago utilized the traditional sector lines to delimit Canada's northern jurisdiction.[174]

By the mid 1950's, however, Ottawa came to restrict the application of the sector theory to land territory only. On August 3, 1956, Jean Lesage, Minister of the Department of Northern Affairs, in reply to a question regarding Canada's position on the legal status of the ice "cap" lying to the north of the archipelago, stated,

> We have never subscribed to the sector theory in application to the ice. We are content that our sovereignty exists over all the Arctic islands....We have never upheld a general sector theory. To our mind, the sea, be it frozen or in its natural liquid state, is the sea; and our sovereignty exists over the lands and over our territorial waters.[175]

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[170] Canada, Statutes, George V (1925), c. 48, sec. 1.

[171] Canada, House of Commons, Debates (1925), p. 3773.

[172] Pharand, op. cit., p. 49.

[173] Canada, House of Commons, Debates (1924), p. 1110.

[174] Pharand, op. cit., pp. 51-55.

[175] Canada, House of Commons, Debates (1956), p. 6955.

Lesage reiterated the government's position when, more than six months later, he was accused by the Opposition of disavowing the sector theory.

> What I said was that Canada has claimed, for a great number of years, all land within that sector as being Canadian territory....[176] I said that we did not claim the open seas in either liquid or frozen form, but that we claim as Canadian all land within that sector up to the North Pole.[177]

It would appear from the Minister's comments that Canada's sovereign jurisdiction in the Arctic did not extend beyond the limits of the archipelago itself and the associated territorial waters. Since the 60th and 141st meridians west did not delimit Canada's actual Arctic boundary, the use of the sector theory may have simply constituted a convenient means by which to describe the territory.

In 1958, the legal status of the sector theory was dealt a blow by a long standing proponent, Lester Pearson. As Canada's Ambassador to Washington, Pearson advanced the sector theory in a 1946 article in *Foreign Affairs*,[178] and, as Leader of the Opposition, he continued his advocacy with the following statement:

> [W]e have claimed sovereignty under what we call the sector theory over the prolongation north, right to their meeting at the North Pole, of the east and west extensions of our boundary. If we are to make that claim stick, and it certainly is important we should make it stick, we have to do everything that is possible, everything that is practical, to develop these areas and reinforce whatever rights we may have in law with the right of occupation.[179]

One month later, however, Pearson questioned the legal status of the sector theory with the assertion that it might not constitute a sufficient basis for Canada's sovereignty claims. In light of the passage of two American submarines beneath the Arctic ice, Pearson contended before the House of Commons:

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[176] Canada, House of Commons, Debates (1957), p. 1993.

[177] Ibid.

[178] Pearson, "Canada Looks 'Down North'." Op. cit., pp. 638-647.

[179] Canada, House of Commons, Debates (1958), p. 1963.

> I suggest to the minister that we shall have considerable difficulty in doing that if we base our claim merely on the sector theory which has not yet, I think, been generally considered a valid doctrine of international law.
>
> The sector theory itself is not enough; it must be followed by rights based on discovery and effective occupation. That had been very much in the mind of the previous government, as no doubt it is in the mind of the present government, to buttress any claims we have under one theory of international law by rights of discovery and effective occupation, which are acknowledged by all as valid in international law.[180]

To this, Alvin Hamilton, Minister of Northern Affairs, replied,

> I am very pleased that the Leader of the Opposition has accepted the phrase, "effective occupation," because you can hold a territory by right of discovery or by claiming it under some sector theory, but where you have great powers holding different points of view, the only way to hold that territory, with all its great potential wealth, is by effective occupation.[181]

Despite the apparent shift in policy by Ottawa, from a general sector theory approach to limiting its application to the land territory itself, Canada has continued to employ, in whole or in part, the traditional sector lines in legislation pertinent to its Arctic domain.[182] But, as Donat Pharand contends, "[q]uite often it is impossible to determine if the use of one or both of the meridians forming the so-called Canadian sector was made for convenience of description only or with intent of ascribing an inherent legal value to it."[183]

This account of Canada's involvement with the sector theory is far from exhaustive, but is believed to be sufficient to demonstate that Canada has been inconsistent in its application and its interpretation.[184] Although it seems that Canada has come to rely on effective occupation in the assertion of its claim of sovereignty over the Arctic archipelago, the effect of the sector theory on Canada's Arctic jurisdiction is perhaps to..."be viewed in the perspective of the total Canadian claim--a claim with broad foundations, a claim, according to the Canadian Government, which is consistent with the principles of international law."[185] While Ottawa seems to have chosen not to rely on the sector theory, it is also apparently not willing to dismiss it outright as of no significance in the assertion of its sovereignty claims to the Arctic archipelago.

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[180] Canada, House of Commons, Debates (1958), p. 3512.

[181] Ibid., p. 3540.

[182] Pharand, op. cit., pp. 58-62.

[183] Ibid., p. 62.

[184] Head, op. cit., p. 210.

The Soviet Union appears to have first invoked the sector theory in the diplomatic Note of 4 November 1924.[186] Discussed above, the Note reiterated Moscow's 1916 claim that the islands lying near its Asian coast formed an extension of the Siberian continental upland. In addition, the Note identified eleven islands, including Wrangel Island, that were lying to the west of the demarcation line formulated in the 1867 Treaty of Cession with the United States.[187] Asserting that the line defined its western boundary in the Arctic, the Soviet government expressed the hope that foreign governments would prevent their nationals from violating the Soviet Union's territorial sovereignty, or reparations would be sought.[188] It would appear that Moscow regarded all territory west of the line of 168° 49' 30" west of Greenwich as Soviet sovereign territory.

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[185] Ibid.

[186] Pharand, op. cit., p. 64. The French text of the Note is found in W. Lakhtine, *Rights Over the Arctic*. (Moscow, 1928). In Russian.

[187] The demarcation line in question is described in Art. I of the 1867 Treaty as follows: "The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring's straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen Ocean." Consolidated Treaty Series, vol. 134, 1867, p. 333. The Soviet Decree of 15 April 1926 set the line at 168° 49' 30". Lakhtine, op. cit., p. 709.

[188] It would appear that justification for the Note was due to the recent visits to Wrangle Island by private expeditions originating from Canada and the United States.

This partial application of the sector theory was later incorporated into a full sector claim. On 15 April 1926, the Presidium of the Central Executive Committee adopted a Decree that described the Soviet Union's Arctic jurisdiction as

> ...forming part of the territory of the Union of Soviet Socialistic Republics all lands and islands already discovered, as well as those which are to be discovered in the future, which at the moment of the publication of the present decrèe are not recognized by the Union of Soviet Socialistic Republics as the territory of any foreign state, and which lie in the Northern Frozen Ocean north of the coast of the Union of Soviet Socialistic Republics up to the North Pole, within the limits between the meridian longitude 32° 4' 35" east of Greenwich, which passes along the eastern side of Vaida Cay through the triangular mark on the Kekurski Cape, and the meridian longitude 168° 49' 30' west from Greenwich, which passes along the middle of the strait which separates Ratmanoff and Krusenstern Islands from the group of Diomede Islands in the Behring Straits.[189]

Although the Soviet government invoked the sector theory, the Decree makes mention only of the "lands and islands" within the sector that formed part of Russian territory. Even though a number of Soviet jurists have subsequently argued that the entire sector--land ice and water--is subject to Soviet sovereignty, there is nothing in Soviet legislation or practice to suggest that this is the case. As Butler contends,

> Although the sector theory received active support from some Soviet jurists, the official view was otherwise. In an article published in 1932, the legal adviser to the USSR People's commisariat for Foreign Affairs made it clear that the 1926 decree merely defined those geographic coordinates within which the Soviet Union laid claim to lands or islands discovered or undiscovered. This neither implied recognition of "frontiers" for polar sectors, nor constituted an explicit endorsement of the sector theory, nor involved any arrangement with other polar powers. In 1935 E. B. Pashukanis did not mention the sector theory at all when treating the Arctic, and the 1926 decree was not amended to take account of frontier adjustments following the Second World War as one would have anticipated if the western geographic coordinates had been equated to a state boundary.[190]

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[189] Lakhtine, op. cit., p. 709.

[190] Wm E. Butler, *Northeast Arctic Passage*. (Alphen aan den Rijn: Sijthoff and Noordhoff, 1978), p. 73.

Butler goes on to conclude,

> There is nothing in subsequent Soviet legislation or practice to suggest that the geographic coordinates laid down in the 1926 decree are a state frontier. On the contrary, foreign commercial vessels, research vessels, fishing and sealing craft, warships, and submarines have frequented the seas north of the Soviet Union without protest. So too have manned, drifting ice stations crossed from "sector" to "sector" without allegation by any Power that territorial rights had been breached.[191]

It is apparent that Moscow's application of the sector theory has been used only to describe all land territory over which it claims sovereignty.

Even though the American state of Alaska lies within the Arctic Circle, and despite its high level of activity in the Antarctic, the United States has neither put forward a sector claim nor shown any indication of entertaining the theory as a legitimate principle of international law. In 1925, the American government did not obtain a permit for the MacMillan-Byrd expedition to enter the Northwest Territories, despite Canada's efforts to have Washington abide by the newly adopted amendment to the Northwest Territories Act. Furthermore, in 1929, the Secretary of the Navy expressed his opposition to a proposed scheme of dividing the Arctic into five national sectors. According to Secretary of the Navy Adams,

> When a private citizen suggested to president Hoover that the United States should take the initiative in bringing about an international arrangement for the partitioning of the Arctic region into national sectors of five contiguous countries (United States, Canada, Denmark, Norway, and Russia), the proposal was called to the attention of the Navy Department, which stated that the course of action proposed-
>
> (a) Is an effort arbitrarily to divide up a large part of the world's area amongst several countries;
> (b) Contains no justification for claiming sovereignty over large areas of the world's surface;

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[191] Ibid., p. 77.

> (c) Violates the long recognized custom of establishing sovereignty over territory by right of discovery;
> (d) Is in effect a claim of sovereignty over high seas, which are universally recognized as free to all nations, and is a novel attempt to create artificially a closed sea and thereby infringe the rights of all nations to the free use of this area. I, therefore, consider that this government should not enter into any such agreement as proposed.[192]

In addition, the U.S., like the Soviets, have operated a number of scientific stations on ice islands that have travelled the Arctic Ocean without any regard for sector delimitations. When, in 1970, a homicide was committed on ice island T-3, the Americans exercised exclusive jurisdiction, despite the island's location within Canada's Arctic sector.[193] It appears that American opposition to the sector theory is concerned primarily with its access to the high seas--a tenet long defended in international law.

Norway has also refused to endorse the sector theory. The 1930 Agreement with Canada regarding Norway's recognition of Canadian sovereignty over the Sverdrup Islands was qualified with the provisions that Norway's position was not to be interpreted as indicating an adherence to the sector theory. According to the Norwegian Note of August 8, 1930, "[a]t the same time, my government is anxious to emphasize that their recognizance of the sovereignty of His Britannic Majesty over these islands is in no way based on any sanction whatever in what is named the 'sector principle.'"[194]

A similar position was put forth by the Norwegian government with its submissions to the Permanent Court of International Justice in the *Eastern Greenland Case*, discussed above. Norway refused to accord the doctrine of contiguity--the basis for the sector theory--with any legal significance. There is no indication that Norway has altered its attitude toward the sector theory.

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[192] Green Haywood Hackworth, *Digest of International Law.* Vol. 1 (Washington: United States Government Printing Office, 1940), pp. 463-464.

[193] Pharand, op. cit., p. 69.

[194] Canada Treaty Series (1930), No. 17. (Ottawa: n.p.), p. 3.

Denmark, too, has provided no indication that its position regarding the sector theory has changed since its dispute with Norway regarding its sovereignty over Eastern Greenland. As this dispute was examined above, Denmark strongly denied Norwegian charges that it placed some reliance on the doctrine of contiguity in defense of its claim, and went on to denounce the doctrine during its submissions to the Court.

In light of the practice of the Arctic states, it cannot be asserted that the sector theory constitutes a principle of regional customary law. The Arctic states themselves have not come to apply the sector theory uniformly, let alone to regard it as a legally binding tenet of international law.

Of the seven claimant states in the Antarctic, six have described their territorial claims in sector form. It is not entirely certain, however, whether these claims are based on the sector theory, or whether the use of meridians of longitude are regarded simply as a convenient means by which to describe the extent of their respective claims.[195] It must be kept in mind that the 1959 Antarctic Treaty indefinitely suspended the establishment or alteration of sovereignty claims on the continent.

Nevertheless, Norway, in keeping with its stated opposition to the application of the sector theory in the Arctic, has refused to register a full sector claim in the Antarctic. Although the eastern and western limits of its territory are described by meridians of longitude, they do not extend so far south as to intersect as the Pole.

Australia, however, does claim a full sector in the Antarctic, but it does not appear to base its claim on the sector theory. Before an Australian Parliamentary Sub-Committee on 12 October 1977, the government's legal advisor asserted that Australia's claim to its Antarctic sector was based on discovery and effective occupation, but it was not based on the sector theory.[196]

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[195] Pharand, op. cit., p. 71.

[196] Bush, op. cit., p. 143, note 4.

Although it would be preferable to be aware of the respective positions of all the Antarctic states regarding the legal status of the sector theory, it is apparent, based on the positions of Norway and Australia, that the sector theory cannot constitute a principle of customary law. It is not uniformly applied and, thus, it cannot be regarded as a customary principle of law that is legally binding.

Hence, in the light of state practice in the Arctic and the Antarctic, it is evident that the sector theory does not form a principle of regional or general customary law. Furthermore, it has been shown that the doctrine of contiguity is incapable of providing the sector theory with any sort of legal sanction. Therefore, the sector theory is not a principle of international law and has little bearing on whether Canada's ultimate claim to the Arctic archipelago is fully legal.

Conclusions

Between the years 1874 and 1930, Canada's attitude toward the Arctic archipelago underwent dramatic change. Canada evolved from a state that knew little of the region and cared little about its new-found jurisdictional authority, to a state that perhaps set the standard for the effective occupation of polar territory with its efforts to assert its authority over the Arctic islands. Initially, Canada was inattentive, exercising its jurisdictional authority only as the need arose, but as the political climate changed and international interest in the archipelago mounted, Canada sought to extend its effective control to the farthest reaches of the Arctic islands.

Although the doctrine of contiguity and its off-shoot, Senator Poirier's sector theory, offer little in the way of legal support for Canada's sovereignty claim to the region in question, Canada's efforts to effectively occupy the Arctic archipelago have been successful in establishing a solid title claim according to the dictates of international law. Even though Canada's claim may not be perfect in the eyes of international law, it is nonetheless superior to any claim another state may attempt to put forth. As the legal situation now stands, Canada appears to have established itself as the sovereign of the Arctic islands, a claim that is substantiated by the fact that Canada's title claim has not been challenged by any foreign power in more than seventy years.

While the question of sovereignty of the Arctic islands appears largely settled, the legal status of the waters dividing these islands seems to be an unresolved issue. Canada claims these straits as internal waters, but the United States appears intent on establishing them as international waters--accessible to all the world's sea-going states.

The legal status of the waters of the Arctic archipelago is an issue of tremendous importance. As the resources of the region come to be more coveted, and technological advances come to make the Arctic more accessible, the legal regime determining access and usage of these waters will inevitably have an impact on how and to what degree the territory and its inhabitants will be treated and protected. It is an issue worthy of further study as it holds tremendous importance for Canada's future.

The direction such future enquiry may take should not only concern itself with the current dictates of international law that may affect the present jurisdictional difficulty, but also attempt to identify where further legal development may be required to resolve the issue. The legal status of ice in international law may be an issue with tremendous bearing on future legal developments concerning jurisdiction over the waters of the Arctic archipelago. Due to the region's unique nature, it may prove necessary for the international community to adopt legal conventions that deal specifically with the water and ice of the Arctic archipelago, allowing for both the development and the preservation of the region.

Although the limited scope of this thesis has not touched on the present and perhaps more pressing issue of control of the waters of the Arctic archipelago, it does provide a necessary basis from which to proceed. Since the sovereign control of the Arctic islands has a direct bearing on the question of waters jurisdiction, this thesis has attempted to clarify what is settled, so that future study may find it possible to concentrate on the current jurisdictional difficulty.

It must also be understood, however, that the scope of this thesis has an important limitation. It is primarily concerned with the legal perspective in dealing with the issue of sovereignty of the Arctic archipelago. Other, more paramount concerns--issues of justice and ethics--have not been examined in this historical-legal analysis. The perennially important issue of what should be done is never adequately answered merely by looking at what is done, or at what the law says.

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